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RETHINKING THE ACT OF STATE DOCTRINE: AN ANALYSIS IN TERMS OF JURISDICTION TO PRESCRIBE

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INTRODUCTION

The act of state doctrine requires United States courts to refrain from questioning the validity of acts done by a foreign sovereign within its own territory.[1] This seemingly simple statement has caused hopeless confusion in the courts,[2] has aroused endless scholarly debate,[3] and has provoked

1. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964); Underhill v. Hernandez, 168 U.S. 250, 252 (1897).

2. *See infra* text accompanying notes 179–217.

3. "[T]he act of state doctrine [is] perhaps the most written-about topic in international law journals in this country since the Supreme Court's landmark decision in [Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964)]." *The International Rule of Law Act: Hearing on S. 1434 Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary,* 97th Cong., 1st Sess. 3 (1981) [hereinafter *Act of State Hearings*] (testimony of Davis R. Robinson, Legal Adviser to the Department of State). Some notable examples include R. FALK, THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER (1964) [hereinafter INTERNATIONAL LEGAL ORDER]; R. FALK, THE STATUS OF LAW IN INTERNATIONAL SOCIETY (1970) [hereinafter INTERNATIONAL SOCIETY]; Bazyler, *Abolishing the Act of State Doctrine,* 134 U. PA. L. REV. 325 (1986); Halberstam, Sabbatino *Resurrected: The Act of State Doctrine in the Revised Restatement of U.S. Foreign Relations Law,* 79 AM. J. INT'L L. 68 (1985); Henkin, *Act of State Today: Recollections in Tranquility,* 6 COLUM. J. TRANSNAT'L L. 175 (1967) [hereinafter *Recollections in Tranquility*]; Henkin, *The Foreign Affairs Power of the Federal Courts:* Sabbatino, 64 COLUM. L. REV. 805 (1964) [hereinafter *Foreign Affairs*]; Mathias, *Restructuring the Act of State Doctrine: A Blueprint for Legislative Reform,* 12 LAW & POL'Y INT'L BUS. 369 (1980); Zander, *The Act of State Doctrine,* 53 AM. J. INT'L L. 826 (1959); Comment, *The Act of State Doctrine: A History of Judicial*

vehement criticism from the bar.[4] Recent cases applying the doctrine to foreign sovereign acts affecting intangible property have raised the level of conceptual confusion to new heights[5] and have triggered yet another flurry of critical commentary.[6]

A basic cause of confusion about the doctrine is that courts and commentators disagree about the nature and scope of the doctrine.[7] For instance, the

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Limitations and Exceptions, 18 HARV. INT'L L.J. 677 (1977); Note, *Rehabilitation and Exoneration of the Act of State Doctrine*, 12 N.Y.U. J. INT'L L. & POL. 599 (1980) [hereinafter Note, *Rehabilitation and Exoneration*]; Note, *Limiting the Act of State Doctrine: A Legislative Initiative*, 23 VA. J. INT'L L. 103 (1982) [hereinafter Note, *Limiting the Act of State*].

4. A recent example is the reaction of the international bar to the Second Circuit's initial decision to affirm a district court decision recognizing as an act of state Costa Rica's default on commercial loan contracts with American banks. *See* Allied Bank Int'l v. Banco Credito Agricola de Cartago, No. 83-7714 (2d Cir. April 23, 1984) (LEXIS, Genfed library, USApp file), *aff'g* 566 F. Supp. 1440 (S.D.N.Y. 1983), *withdrawn and vacated*, 757 F.2d 516 (2d Cir.), *cert. dismissed*, 106 S. Ct. 30 (1985). The Second Circuit's initial decision was reported in the advance sheets at 733 F.2d 23 (copy on file with the *Washington Law Review*), but was withdrawn from the bound volume after the Second Circuit granted a rehearing.

The Second Circuit reversed its initial decision on rehearing, *see infra* note 199, but the initial decision "created shock waves throughout the U.S. international banking community." Rendell, *The* Allied Bank *Case and Its Aftermath*, 20 INT'L LAW. 819, 823 (1986); *see, e.g.*, Brown, *Enforcing bank sovereign lending in New York*, Int'l Fin. L. Rev., July 1984, at 5, 7 ("[t]he decision took the international banking community by storm"); Warden, *Choice of Law and Act of State Questions in International Banking Transactions*, in PRIVATE INVESTORS ABROAD—PROBLEMS AND SOLUTIONS IN INTERNATIONAL BUSINESS IN 1984, at 300 (J. Moss ed. 1984) (decision may undermine "essential premise [of] contractual undertakings" with foreign nations); *see also* Meissner, *Crisis as an Opportunity for Change: A Commentary on the Debt Restructuring Process*, 17 N.Y.U. J. INT'L L. & POL. 613, 626 (1985) (Second Circuit's initial *Allied Bank* decision is "threatening to New York as an international financial center as well as the sanctity of contract law." (footnote omitted)).

5. *See, e.g.*, Drexel Burnham Lambert Group, Inc. v. A.W. Galadari Commodities, 777 F.2d 877 (2d Cir. 1985); Callejo v. Bancomer, S.A., 764 F. 2d 1101 (5th Cir. 1985); Braka v. Bancomer, S.N.C., 762 F.2d 222 (2d Cir. 1985); Allied Bank Int'l v. Banco Credito Agricola de Cartago, 757 F.2d 516 (2d Cir.), *cert. dismissed*, 106 S. Ct. 30 (1985); Garcia v. Chase Manhattan Bank, N.A., 735 F.2d 645 (2d Cir. 1984); Libra Bank, Ltd. v. Banco Nacional de Costa Rica, S.A., 570 F. Supp. 870 (S.D.N.Y. 1983); Perez v. Chase Manhattan Bank, N.A., 61 N.Y.2d 460, 463 N.E.2d 5, 474 N.Y.S.2d 689, *cert. denied*, 469 U.S. 966 (1984); *see also infra* text accompanying notes 179–217.

6. *See, e.g.*, Ebenroth & Teitz, *Winning (or Losing) by Default: The Act of State Doctrine, Sovereign Immunity, and Comity in International Business Transactions*, 19 INT'L LAW. 225 (1985); Hoffman & Deming, *The Role of the U.S. Courts in the Transnational Flow of Funds*, 17 N.Y.U. J. INT'L L. & POL. 493 (1985); Tigert, Allied Bank International: *A United States Government Perspective*, 17 N.Y.U. J. INT'L L. & POL. 511 (1985); Zaitzeff & Kunz, *The Act of State Doctrine and the* Allied Bank *Case*, 40 BUS. LAW. 449 (1985); Comment, *Debt Situs and the Act of State Doctrine: A Proposal for a More Flexible Standard*, 49 ALB. L. REV. 647 (1985) [hereinafter Comment, *Debt Situs*]; Note, *The Act of State Doctrine: Resolving Debt Situs Confusion*, 86 COLUM. L. REV. 594 (1986) [hereinafter Note, *Resolving Debt Situs*]; Recent Developments, *Act of State: Treatment of Foreign Defaults in Domestic Courts*, 25 HARV. INT'L L.J. 195 (1984); Note, *Default on Foreign Sovereign Debt: A Question for the Courts?*, 18 IND. L. REV. 959 (1985); Comment, *The Act of State Doctrine and Foreign Sovereign Defaults on United States Bank Loans: A New Focus for a Muddled Doctrine*, 133 U. PA. L. REV. 469 (1985); Note, *The Resolution of Act of State Disputes Involving Indefinitely Situated Property*, 25 VA. J. INT'L L. 901 (1985) [hereinafter Note, *Indefinitely Situated Property*].

7. *See infra* text accompanying notes 218–74.

doctrine has been called a special rule of choice of law,[8] a doctrine of judicial deference based on the principle of separation of powers,[9] and a doctrine of nonjusticiability similar to the political question doctrine.[10] Critics of the act of state doctrine point out that the existence of these inconsistent theories has confounded the courts[11] and judicial application of these discordant theories has led to arbitrary and unjust results.[12] According to some critics, the act of state doctrine should be abolished altogether.[13]

This article proposes a new conception of the act of state doctrine.[14] The basic approach of this new conception is that the act of state doctrine should be analyzed in terms of international law principles governing a sovereign state's[15] jurisdiction to prescribe rules of law. As used here, jurisdiction to prescribe refers to the appropriate authority of a state "to make its law applicable to the activities, relations, or status of persons, or the interests of persons in things."[16] In analyzing questions of prescriptive jurisdiction,

8. *See* Henkin, *Recollections in Tranquility*, *supra* note 3, at 178.

9. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423 (1964).

10. *See* First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 787 (1972) (Brennan, J., dissenting).

11. *See, e.g.*, Bazyler, *supra* note 3, at 328–30, 334–58.

12. *See Act of State Hearings*, *supra* note 3, at 22 (statement of Prof. Don Wallace).

13. *See, e.g.*, Bazyler, *supra* note 3, at 396–98; Wallace, *Abolishing or Changing the Act of State Doctrine by Legislation: Comments*, in ACT OF STATE AND EXTRATERRITORIAL REACH 25 (J. Lacy ed. 1983); *see also* Mathias, *supra* note 3, at 409–10 (proposing a statute that precludes application of the act of state doctrine to any acts in violation of international law). Professor Bazyler suggests that courts would fare better if they applied a number of existing legal doctrines that embody the same concerns now animating the act of state doctrine. *See* Bazyler, *supra* note 3, at 384–92; *see also* Mathias, *supra* note 3, at 408. The act of state doctrine has not won many defenders. One notable exception is Professor Richard Falk. *See, e.g.*, R. FALK, INTERNATIONAL LEGAL ORDER, *supra* note 3, at 64–114.

Professors Henkin and Lowenfeld have stated that despite the critical opposition to the doctrine, it will probably not disappear. *See* Henkin & Lowenfeld, *Letter to the Editor*, 79 AM. J. INT'L L. 717, 718 (1985).

14. *See infra* text accompanying notes 337–43.

15. Section 201 of the RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) (Tent. Draft No. 6, 1985) [hereinafter RESTATEMENT FOREIGN RELATIONS (Tent. Draft No. 6)] defines "state" as follows:

> Under international law, a "state" is an entity which has a defined territory and permanent population, under the control of its own government, and which engages in, or has the capacity to engage in, formal relations with other such entities.

During its annual meeting, held May 13–16, 1986, in Washington, D.C., the American Law Institute (ALI) approved the Restatement of Foreign Relations Law of the United States (Revised). *See Summary of Proceedings of Annual Meeting of American Law Institute*, 54 U.S.L.W. 2593, 2595–96 (May 27, 1986). The ALI has yet to promulgate an official version of the new Restatement, and all references to the new Restatement will be to its tentative draft form.

16. Jurisdiction to prescribe refers to a nation's ability "to make its law applicable to the activities, relations, or status of persons, or the interests of persons in things, whether by legislation, by executive act or order, by administrative rule or regulation, or by determination of a court." RESTATEMENT FOREIGN RELATIONS (Tent. Draft No. 6), *supra* note 15, § 401(1); *see also* Lowenfeld, *Jurisdiction to Prescribe: Some Contributions From an International Lawyer*, 4 B.U. INT'L L.J. 91, 91–93 (1986). For

this article employs the useful and important approach set forth by the recently adopted Restatement of Foreign Relations Law of the United States (Revised).[17]

To illustrate this approach, suppose that a forum court is called upon to resolve a dispute involving foreign sovereign acts. The court determines that under international law the foreign legal system has the appropriate authority to make its law applicable to those acts.[18] In this case, the foreign sovereign has committed acts over which it has proper jurisdiction to prescribe. The court of the forum state is bound to apply the law of the foreign sovereign to determine the legal consequences of those acts and may not question the results unless they are contrary to international law.[19] On the other hand, suppose that the forum court determines that under international law the legal system of the forum state has the appropriate authority to make its law applicable to the acts in question. In this case, the foreign sovereign has committed acts over which the forum state has proper jurisdiction to prescribe.[20] The legal status of the acts under the foreign sovereign's own legal system is irrelevant to the adjudication of the dispute by the forum court.[21] Rather, the legal consequences of the acts of the foreign sovereign are determined solely by the laws of the forum state. Otherwise, the foreign sovereign would, in effect, be amending legal relationships that should be governed by the legal system of the forum state.

Since modern international law contemplates broad and overlapping bases of jurisdiction to prescribe, both the forum and the foreign sovereign will frequently have concurrent bases to exercise prescriptive jurisdiction over the same persons, things, or conduct.[22] In these cases, each sovereign state should evaluate the relevant competing interests by a standard of reasonableness and one state should defer to the other if the other state has a greater interest at stake.[23]

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an analysis in terms of jurisdiction to prescribe of acts of state affecting intangible property, see Note, *Indefinitely Situated Property, supra* note 6.

17. *See* RESTATEMENT FOREIGN RELATIONS (Tent. Draft No. 6), *supra* note 15, § 402; RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) § 403 (Tent. Draft No. 7, 1986) [hereinafter RESTATEMENT FOREIGN RELATIONS (Tent. Draft No. 7)].

18. *See infra* text accompanying notes 389–415.

19. One major distinction between the proposed conception and the traditional conception of the doctrine is that under the former, sovereign acts violating international law are not shielded from judicial inquiry. For a justification of this position, see *infra* text accompanying notes 368–69.

20. *See infra* text accompanying notes 416–25.

21. The forum may, however, choose voluntarily to recognize the foreign law. *See infra* note 342.

22. *See* RESTATEMENT FOREIGN RELATIONS (Tent. Draft No. 6), *supra* note 15, § 402 comment b; *see also infra* text accompanying note 351.

23. *See* RESTATEMENT FOREIGN RELATIONS (Tent. Draft No. 7), *supra* note 17, § 403(g); *see also infra* text accompanying notes 355–56.

Admittedly, in certain cases, an analysis in terms of jurisdiction to prescribe will be scarcely easier than an analysis based upon a current theory of the act of state doctrine.[24] Nonetheless, this approach can be justified because it offers jurisprudential and legal advantages over the current theories comprising act of state jurisprudence.

First, the doctrine of jurisdiction to prescribe incorporates the descendants of positivist concepts of power and absolute territoriality—the original underpinnings of the act of state doctrine.[25] By building upon contemporary versions of the doctrine's original foundations, an analysis of the act of state doctrine in terms of jurisdiction to prescribe remains faithful to the doctrine's origins and accommodates the needs of the modern international legal and economic order.

Second, jurisdiction to prescribe is a fundamental and powerful concept that plays an increasingly important role as international business transactions multiply and nations, such as the United States, seek to regulate such transactions across national boundaries. Developing agreed-upon rules of prescriptive jurisdiction should enhance understanding of the extraterritorial reach of the federal antitrust and securities laws, an area where attempts by the United States to exercise extensive prescriptive jurisdiction has led to international tension and resentment.[26] In addition, the concept of jurisdiction to prescribe has broad explanatory power. The act of state doctrine and the doctrine of absolute and restrictive sovereign immunity, now considered discrete and independent theories, can be analyzed under this single, unified approach.[27] Also, most of the exceptions to the act of state doctrine can be incorporated directly into the main analysis in terms of jurisdiction to prescribe.[28] The development of a single and comprehensive theory, applicable to areas now considered governed by independent legal doctrines and exceptions, offers the advantages of economy and simplicity.

Third, the doctrine of jurisdiction to prescribe is governed by rules of international law, now recognized as part of the federal law of the United States.[29] According to legal scholars, the act of state doctrine "is probably the single most important reason for the arrested development of international law in the United States."[30] A theory of the act of state doctrine based

24. This does not mean that a clear solution cannot be found in most cases. *See infra* text accompanying note 359.

25. *See infra* text accompanying notes 53–67.

26. *See infra* note 385 and accompanying text.

27. For an analysis of restrictive sovereign immunity in terms of jurisdiction to prescribe, see Singer, *Abandoning Restrictive Sovereign Immunity: An Analysis in Terms of Jurisdiction to Prescribe*, 26 HARV. INT'L L.J. 1 (1985); *see also infra* text accompanying notes 374–76.

28. *See infra* text accompanying notes 377–83.

29. *See infra* notes 371–72 and accompanying text.

30. Bazyler, *supra* note 3, at 329.

upon jurisdiction to prescribe will allow United States courts to contribute to the development of international law.[31] Moreover, the proposed new conception of the act of state doctrine satisfies the judicial concern that the doctrine should be governed by federal law, a concern that has profoundly influenced the doctrine's previous development.[32]

Fourth, an act of state analysis in terms of jurisdiction to prescribe will bring much needed analytical clarity to current act of state disputes involving intangible property and contract rights. Since traditional act of state analysis offers little guidance in this area, courts and commentators propose conflicting and confusing new approaches to the application of the act of state doctrine to sovereign defaults on private loans and sovereign expropriations of foreign bank branches or deposits.[33] Moreover, given the likelihood of increasing numbers of international business transactions involving intangible property and contract rights, it will prove useful to invest scholarly and judicial energy into developing principles regulating the competence of nations to prescribe rules of law governing intangible property.[34]

Part I of this article sets forth a history and development of theories of the act of state doctrine. This section traces the major shifts in the jurisprudential and legal foundations of the doctrine that occurred between its birth in the nineteenth century and its reemergence in the latter half of the twentieth century. These shifts contributed to the development of incompatible theories of the doctrine. Part II demonstrates that each of these current theories is seriously flawed for various jurisprudential, legal, and practical reasons. Part III first proposes and defends an analysis of the act of state doctrine in terms of jurisdiction to prescribe, and argues that the proposed new conception of the doctrine will serve a valuable and unique function in the modern international legal order. Part III then applies an act of state analysis in terms of jurisdiction to prescribe to major act of state cases and to recent cases involving intangible property.

31. *See infra* text accompanying notes 386–88.

32. *See infra* text accompanying notes 90–98, 112–21.

33. *See, e.g.*, Callejo v. Bancomer, S.A., 764 F.2d 1101, 1123–24 (5th Cir. 1985) (suggesting an incidents of the debt analysis focusing on the likelihood that judicial examination of an act of state will antagonize the foreign sovereign); Comment, *Debt Situs*, *supra* note 6, at 673–79 (setting forth various links of territoriality to foreign sovereign as indicative of when judicial review will antagonize foreign sovereign's reasonable expectations of dominion over debt); Note, *Resolving Debt Situs*, *supra* note 6, at 605–06 (advocating an incidents of the debt analysis). For a fuller discussion, see *infra* text accompanying notes 275–306.

34. *See infra* text accompanying notes 384–85; *see also infra* note 458.

I. HISTORY AND DEVELOPMENT OF THEORIES OF THE ACT OF STATE DOCTRINE

A. *Positivist Concepts of Power and Absolute Territoriality:* Underhill *and the Vested Rights Theory of Choice of Law*

Although the act of state doctrine[35] was foreshadowed by several Supreme Court cases in the late eighteenth and early nineteenth centuries,[36] the birth of the doctrine in the United States occurred in *Underhill v. Hernandez*,[37] decided by the Supreme Court in 1897.

George Underhill, a United States citizen living in Venezuela, operated a waterworks system and machinery repair business.[38] When revolution swept Venezuela in 1892, General Hernandez, military commander of the ultimately successful revolutionary armies, detained Underhill and forced him to operate the waterworks and repair business for the benefit of the insurgents.[39] After his release, Underhill returned to the United States and brought suit against Hernandez for false imprisonment and assault.[40] The

35. The historical roots of the act of state doctrine can be traced to the doctrine of sovereign immunity. *See* M. AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 109 (4th ed. 1982). The system of sovereign immunity developed in twelfth century feudal England because there was no way of enforcing law against kings, who controlled the courts. *See* 1 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 517–18 (2d ed. 1899); *see also* Hill, *A Policy Analysis of the American Law of Foreign State Immunity*, 50 FORDHAM L. REV. 155, 211 (1981); Note, *Act of State and Sovereign Immunities Doctrines: The Need to Establish Congruity*, 17 U.S.F. L. REV. 91, 93 (1982). As monarchies declined and modern forms of government arose, act of state immunity was extended to state officials acting on behalf of the state. Act of state immunity thus arose as an extension of the immunity of the state that the officials represented. *See* M. AKEHURST, *supra*, at 109.

The first English cases to recognize the act of state doctrine as distinct from the doctrine of sovereign immunity are Blad v. Bamfield, 36 Eng. Rep. 992 (Ch. 1674), and Duke of Brunswick v. King of Hanover, 9 Eng. Rep. 993 (H.L. 1848).

36. *See, e.g.*, The Santissima Trinidad, 20 U.S. (7 Wheat.) 283, 336 (1822); L'Invincible, 14 U.S. (1 Wheat.) 238, 253 (1816); Hudson v. Guestier, 8 U.S. (4 Cranch) 293, 294 (1808); Ware v. Hylton, 3 U.S. (3 Dall.) 199, 230 (1796). The Supreme Court first recognized the act of state doctrine in The Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116 (1812). *See* First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 762 (1972) (plurality opinion of Rehnquist, J.) ("The separate lines of cases enunciating both the act of state and sovereign immunity doctrines have a common source in the case of The Schooner Exchange v. M'Faddon . . . ."). In *The Schooner Exchange*, Chief Justice Marshall stated:

> The arguments in favor of this opinion which have been drawn from the general inability of the judicial power to enforce its decisions in cases of this description, from the consideration, that the sovereign power of the nation is alone competent to avenge wrongs committed by a sovereign, that the questions to which such wrongs give birth are rather questions of policy than of law, that they are for diplomatic, rather than legal discussion, are of great weight, and merit serious attention.

11 U.S. (7 Cranch) at 146.

37. 168 U.S. 250 (1897).

38. *Id.* at 251.

39. These facts are contained in the lower court opinion. *See* Underhill v. Hernandez, 65 F. 577, 578 (2d Cir. 1895), *aff'd*, 168 U.S. 250 (1897).

40. 168 U.S. at 251.

United States Supreme Court held that General Hernandez was shielded from liability because he was acting under authority of the de facto government of Venezuela.[41] Chief Justice Fuller reasoned that "[t]he immunity of individuals from suits brought in foreign tribunals for acts done within their own states, in the exercise of governmental authority, . . . must necessarily extend to the agents of governments ruling by paramount force as a matter of fact."[42]

In the course of his opinion, Chief Justice Fuller articulated what has come to be known as the "classic statement"[43] of the act of state doctrine:

> Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.[44]

The jurisprudential underpinnings of *Underhill's* dictum[45] can be traced to the vested rights theory of choice of law advocated in the United States by Professor Joseph Beale[46] and Justice Oliver Wendell Holmes. Under Beale's formulation, "[a] right having been created by the appropriate law, the recognition of its existence should follow everywhere. . . . Thus an act valid where done cannot be called in question anywhere."[47] According to this theory, legal rights can exist only if they are created by the sovereign,

41. *Id.* at 253–54.

42. *Id.* at 252. Thus, commentators contend that the *Underhill* decision could have relied upon the doctrine of sovereign immunity alone and that Chief Justice Fuller's pronouncement of the act of state doctrine is dictum. *See* Bazyler, *supra* note 3, at 332–33; Zander, *supra* note 3, at 830; Note, *Rehabilitation and Exoneration, supra* note 3, at 603.

43. *See, e.g.*, First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 763 (1972) (plurality opinion of Rehnquist, J.) ("classic American statement") (quoting Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 416 (1964)).

44. 168 U.S. at 252.

45. *See supra* note 42.

46. Professor Joseph H. Beale of the Harvard Law School was the chief proponent of the vested rights theory in the United States, but the theory had an antecedent European proponent in A.V. Dicey, whose *Conflict of Laws* (1896) was the seminal choice of law treatise in England. Professor Cavers has suggested that according to Dicey, "the task of the court in a choice-of-law case was the enforcement of vested rights." R. CRAMTON, D. CURRIE & H. KAY, CONFLICT OF LAWS 6 (3d ed. 1981) (quoting D. CAVERS, THE CHOICE-OF-LAW PROCESS 5 (1965)).

47. 3 J. BEALE, A SELECTION OF CASES ON THE CONFLICT OF LAWS 517 (1902) (citations omitted). Beale's views were heavily influenced by the English philosophers Jeremy Bentham and John Austin. *See infra* text accompanying notes 53–57. The theory that only the sovereign can create legal rights can be traced back to Thomas Hobbes, who wrote:

> The legislator in all commonwealths, is only the sovereign . . . . For the legislator is he that maketh the law. And the commonwealth only prescribes, and commandeth the observation of those rules, which we call law: therefore the commonwealth is the legislator. But the commonwealth is no person, nor has the capacity to do anything except by the representative, that is, the sovereign; and therefore the sovereign is the sole legislator.

T. HOBBES, LEVIATHAN 173 (M. Oakeshott ed. 1946) (1651).

and only the constitutive laws that created the legal rights can determine the nature, scope, and validity of those rights.[48]

Professor Beale's enormous influence was felt through his position as reporter for the first Restatement of the Law of Conflict of Laws, which appeared in 1934, and his views were highly influential in the courts from approximately 1900 to about 1950.[49] Beale found a champion for his theory on the Supreme Court in Justice Holmes,[50] who, in 1909, stated a judicial formulation of the vested rights theory in *American Banana Co. v. United Fruit Co.*[51] In that case, the Supreme Court refused to hold a New Jersey corporation liable under apparently applicable United States antitrust laws for conspiring with government officials of Panama to monopolize the Central American banana trade with the United States:

> [T]he general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done . . . . The fundamental reason [for not invalidating a foreign act of state] is that it is a contradiction in terms to say that, within its jurisdiction, it is unlawful to persuade a sovereign power to bring about a result that it declares by its conduct to be desirable and proper . . . . The very meaning of sovereignty is that the decree of the sovereign makes law.[52]

Beale and Holmes's views had their conceptual roots in John Austin's enormously influential theory of positivist law.[53] Austin, a disciple of the

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48. *See* 3 J. BEALE, *supra* note 47, at 501–04. Beale traced the judicial application of the vested rights theory back to Dalrymple v. Dalrymple, 2 Hagg. Consis. 54, 161 Eng. Rep. 665 (1811). An Englishman, already married to a Scottish woman in Scotland, married another woman in England. When the first wife sued to assert her marriage rights, the court had to decide whether Scottish or English law applied. The court held:

> Being entertained in an English Court, it must be adjudicated according to the principles of English law. . . . But the only principle applicable to such a case by the law of England is, that the validity of [the first wife's] marriage rights must be tried by reference to the law of the country, where if they exist at all, they had their origin. . . . [T]he law of England . . . leaves the legal question to the exclusive judgment of the law of Scotland.

Id. at 58–59, 161 Eng. Rep. at 667.

49. *See* E. SCOLES & P. HAY, CONFLICT OF LAWS 13–14 (1982).

50. Justice Holmes has been called "the most fanatical of vested rights fanatics." Schlesinger, *A Recurrent Problem in Transnational Litigation: The Effect of Failure to Invoke or Prove the Applicable Foreign Law*, 59 CORNELL L. REV. 1, 7 (1973). Some might contend that the title goes to Beale. *See* R. CRAMTON, D. CURRIE & H. KAY, *supra* note 46, at 6 (labeling Beale as the "cataclysmic force in the field of conflict of law in the early Twentieth Century").

51. 213 U.S. 347 (1909).

52. *Id.* at 356, 358; *see also* Cuba R.R. v. Crosby, 222 U.S. 473, 478–79 (1912); Slater v. Mexican Nat'l R.R., 194 U.S. 120, 126 (1904). The narrow holding of *American Banana* has been overruled. The antitrust laws reach certain conspiracies even if part of the conduct occurred outside the United States. *See, e.g.*, Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 704 (1962); United States v. Sisal Sales Corp., 274 U.S. 268, 276 (1927).

53. Professor Christie has stated that "[i]t is impossible to overemphasize the importance of Austin in the development of legal philosophy in the English-speaking world." G. CHRISTIE, JURISPRUDENCE

English utilitarian Jeremy Bentham,[54] believed that only the sovereign can create laws, a proposition he derived from a general theory about the nature of law. Austin was one of the first philosophers to develop a comprehensive theory about the nature of law and the nation-state, and had great influence upon the development of legal philosophy in the English-speaking world.[55] Austin viewed law as the desire of the sovereign expressed in a command that others behave in a certain way, backed by the sovereign's power and will to sanction disobedience.[56] Austin provided the conceptual foundations for Beale's vested rights theory:

> The impact of Bentham and Austin on . . . Beale is apparent. The view that law has its source in sovereign command led to the statement that courts always applied their own law. The same essential idea, that rights were the creature of sovereign command, led to the theory of vested rights—rights created by a foreign sovereign but recognized and enforced by local law.[57]

Under Austin's theory, the sovereign's power to enforce the law is the ultimate source of legal obligation. What distinguishes a rule of law from all other expressions of desire is that law is backed by the sovereign's

467 (1973). Austin is generally viewed as the founder of legal positivism, which is "now accepted in one form or another by most working and academic lawyers who hold views on jurisprudence." R. DWORKIN, TAKING RIGHTS SERIOUSLY 16 (1979). Professor H.L.A. Hart's version of legal positivism set forth in *The Concept of Law* (1961) is now generally regarded as the most powerful expression of the theory. *See* R. DWORKIN, *supra*, at 16; *see also* J. MURPHY & J. COLEMAN, THE PHILOSOPHY OF LAW 31 (1984). While legal positivism is associated with the nineteenth and twentieth centuries, the roots of the doctrine can be traced far back in the intellectual history of mankind. *See* G. CHRISTIE, *supra*, at 292. Legal positivism holds two fundamental tenets. First, the law of a community is a set of posited rules that derives its binding force from the dominant political authority in civil society. Second, law, however it might be influenced by morals, is conceptually distinct from morals. *See id.*

54. *See* G. CHRISTIE, *supra* note 53, at 467. Austin himself was influenced by the views of Thomas Hobbes, *see id.* at 294, and especially by Jeremy Bentham, whose definition of law as the expression of a sovereign command foreshadowed Austin's similar definition. *See* H.L.A. HART, ESSAYS ON BENTHAM 108 (1982) (noting that Austin's work was an "obviously derivative work" based on Bentham's theory); *see also* W. DUNNING, A HISTORY OF POLITICAL THEORIES, FROM ROUSSEAU TO SPENCER 211–24 (1920).

55. *See* G. CHRISTIE, *supra* note 53, at 467.

56. 1 J. AUSTIN, LECTURES ON JURISPRUDENCE 90–92, 99–100, 225–27 (R. Campbell 4th ed. 1873) (1832).

57. Katzenbach, *Conflicts on an Unruly Horse: Reciprocal Claims and Tolerances in Interstate and International Law*, 65 YALE L.J. 1087, 1115 (1956). Austinian notions of power also strongly influenced Justice Holmes. *See* P. JESSUP, TRANSNATIONAL LAW 39 (1956) ("The territorial concept was strongly rooted in Justice Holmes's mind."); Cheatham, *American Theories of Conflict of Laws: Their Role and Utility*, 58 HARV. L. REV. 361, 384 (1945) ("The opinions of [Justice Holmes] came to identify jurisdiction with power, and legal power with physical power."); Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 593 (1958) (noting that Austin and Holmes shared many ideas). For a sampling of Justice Holmes's use of these positivist concepts, see, e.g., McDonald v. Mabee, 243 U.S. 90, 91 (1917) (the "foundation of jurisdiction is physical power"); Michigan Trust Co. v. Ferry, 228 U.S. 346, 356 (1913) ("[j]urisdiction is power"); American Banana Co. v. United Fruit Co., 213 U.S. 347, 357 (1909) ("All legislation is prima facie territorial.").

power.[58] A law not backed by a sanction is not a law at all.[59] "In the end [positivist theory] equates the law with power; there is law only where there is power."[60] Austin's notion that law is ultimately based on the sovereign's power to sanction is echoed by Justice Holmes in *American Banana:*

> Law is a statement of the circumstances, in which the public force will be brought to bear upon men through the courts. But [law] commonly is confined to such prophecies or threats when addressed to persons living within the power of the courts. A threat that depends upon the choice of the party affected to bring himself within that power hardly would be called law in the ordinary sense.[61]

Austin's reliance on power led to notions of absolute territoriality, a central tenet of Beale's vested rights theory. The sovereign had plenary power to enforce its law within, but only within, its territory.[62] Thus, the validity of acts must be determined according to the law of the sovereign in whose territory the acts occurred. If the right is created by the law of the sovereign, then that sovereign's law must be applied everywhere to determine the nature and extent of the right. In the words of Justice Holmes, "as the only source of this obligation is the law of the place of the act, it follows that that determines not merely the existence of the obligation . . . [,] but equally determines its extent."[63]

It is not generally recognized that the central tenet of Austin's positivist theory—that the sovereign's power to enforce is the ultimate source of law—and Beale's legal expression of that tenet, combined to form the conceptual foundations of the act of state doctrine.[64] Under Austin's

58. *See* 1 J. AUSTIN, *supra* note 56, at 91.

59. *Id.* at 101.

60. Radbruch, *Five Minutes of Legal Philosophy,* in PHILOSOPHY OF LAW 89 (J. Feinberg & H. Gross eds. 1980); *see also* G. CHRISTIE, *supra* note 53, at 294 (Austin insisted that "law is based, in the final instance, on power or, as he termed it, 'might.'").

61. American Banana Co. v. United Fruit Co., 213 U.S. 347, 357 (1909).

62. *See* 3 J. BEALE, *supra* note 47, § 7, at 502 (1902) ("'[T]he law of the land' [is] a law which belongs to a certain political subdivision of territory. The law prevails throughout this territory; and conversely, it cannot prevail as law outside it . . . ."); *see also* American Banana Co. v. United Fruit Co., 213 U.S. 347, 357 (1909) (the general rule of construction is that a "[s]tatute [is] intended to be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power").

63. Slater v. Mexican Nat'l R.R., 194 U.S. 120, 126 (1904); *see also* Banco Nacional de Cuba v. Sabbatino, 307 F.2d 845, 857 (2d Cir. 1962) ("a positivistic concept of territorial sovereignty" seems to underlie the act of state doctrine), *rev'd,* 376 U.S. 398 (1964).

64. There is widespread uncertainty about the exact jurisprudential origin and rationale of the act of state doctrine. *See, e.g.,* Mathias, *supra* note 3, at 372 ("No writer, judge or lawyer has been able to identify the exact origin of [the act of state doctrine]."). *See also* Sage Int'l, Ltd. v. Cadillac Gage Co., 534 F. Supp. 896, 900 (E.D. Mich. 1981) ("there remains disagreement as to the origins . . . of the doctrine"); Bazyler, *supra* note 3, at 334 (noting that the exact scope and meaning of the doctrine were obscured from its inception); Gordon, *The Origin and Development of the Act of State Doctrine,* 8 RUT.-CAM. L.J. 595, 614 (1977) (the act of state doctrine had "mysterious beginnings"); Wallace,

positivist theory, where the sovereign itself acts within its own territory, where it has plenary power, its acts are, by definition, legally valid.[65] Under Beale's vested rights theory, acts valid where done are valid everywhere.[66] Thus, acts of the sovereign, or acts of state, done within the sovereign's own territory, by definition legally valid there, are legally valid everywhere.[67]

Beale's theory was so influential that by the time the next act of state cases were decided by the Supreme Court in 1918, it seemed as if his "territorialist" theory had been incorporated into the United States Constitution.[68] Although the constitutional aspect of territorialism did not last long—it soon met its demise in 1922[69]—the vested rights theory and its territorialist notions reigned supreme in the field of conflict of laws when the Supreme Court decided *Oetjen v. Central Leather Co.*[70] and *Ricaud v. American Metal Co.*[71] These cases involved expropriations by the Mexican revolutionary government of chattel property from Mexican citizens.[72] The Mexican government then sold the property to buyers who subsequently brought the property into the United States.[73] The original owners, who had fled to the United States, or their successors, brought suit to recover the

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Introductory Remarks, in ACT OF STATE AND EXTRATERRITORIAL REACH (J. Lacey ed. 1983) (The act of state doctrine "is in fact a fairly confused doctrine of law, not only in actual nature, but also in its underpinnings [and] its origins."); Note, *Rehabilitation and Exoneration, supra* note 3, at 601–10.

While the historical roots of the doctrine are generally traced to sovereign immunity, *see* Libra Bank, Ltd. v. Banco Nacional de Costa Rica, 570 F. Supp. 870, 876 (S.D.N.Y. 1983); Note, *Rehabilitation and Exoneration, supra* note 3, at 600–01; *see also supra* note 35, the act of state doctrine emerged as a distinct and independent bar to judicial scrutiny in Underhill v. Hernandez, 168 U.S. 250 (1897), and disagreement with respect to the original rationale for the *Underhill* doctrine has existed ever since. *See* Note, *Limiting the Act of State, supra* note 3, at 103–04 (collecting sources and noting that confusion concerning rationale for doctrine has existed since its inception).

65. Justice Holmes echoed these thoughts in *American Banana* when he stated that "[t]he very meaning of sovereignty is that the decree of the sovereign makes law." 213 U.S. at 358.

Austin's sovereign is a legally unlimited sovereign because in the area of positive law, the sovereign could do no wrong. Austin did note that other operative forces checked the sovereign's will. *See* 1 J. AUSTIN, *supra* note 56, at 99; *see also* W. DUNNING, *supra* note 54, at 229.

66. *See supra* text accompanying notes 47–48.

67. *Cf.* Mathias, *supra* note 3, at 392 ("The 'traditional formulation' of *Underhill* is indeed traditional in that it implicitly equates 'respect' for the 'independence of every other sovereign state' with territorial positivism (the proposition that the sovereign state can do no wrong within its own borders).").

68. *See* J. MARTIN, PERSPECTIVES ON CONFLICT OF LAWS: CHOICE OF LAW 1–2 (1980) (citing New York Life Ins. Co. v. Dodge, 246 U.S. 357, 357–77 (1918)). *New York Life* was argued about two weeks after the Supreme Court's next act of state decisions in Oetjen v. Central Leather Co., 246 U.S. 297 (1918), and Ricaud v. American Metal Co., 246 U.S. 304 (1918), and was decided one month after these decisions.

69. According to Professor Martin, the constitutional aspect of territorialism met its demise in Mutual Life Ins. Co. v. Liebing, 259 U.S. 209 (1922). *See* J. MARTIN, *supra* note 68.

70. 246 U.S. 297 (1918).

71. 246 U.S. 304 (1918).

72. *See Oetjen*, 246 U.S. at 299; *Ricaud*, 246 U.S. at 306.

73. *See Oetjen*, 246 U.S. at 301; *Ricaud*, 246 U.S. at 305–06, 308.

goods, and the Supreme Court had to decide who had title.[74] The question of title depended upon the resolution of Mexico's claim that it had validly transferred title to itself when it expropriated the chattels. Applying choice of law analysis, *Ricaud* held:

> [T]itle to the property in this case must be determined by the result of the action taken by the military authorities of Mexico . . . . [T]he act within its own boundaries of one sovereign State cannot become the subject of reexamination and modification in the courts of another. Such action, when shown to have been taken, becomes . . . a rule of decision for the courts of this country.[75]

The current understanding of the act of state doctrine commonly links its origins in *Underhill, Ricaud,* and *Oetjen* with the theory of comity.[76] Yet, the theory of comity cannot wholly account for mandatory recognition of the foreign acts of state. In *Oetjen,* the Supreme Court invoked the theory of comity as an *additional* ground for recognizing the acts of the Mexican government:

> The principle that the conduct of one independent government cannot be questioned in the courts of another . . . rests at last upon the highest considerations of international comity and expediency. To permit the validity of the acts of one sovereign State to be reexamined and perhaps condemned by the courts of another would very certainly "imperil the amicable relations between governments and vex the peace of nations."[77]

According to Joseph Story, the chief proponent of the comity theory, sovereign states possessed absolute and exclusive jurisdiction in their own territories, but national laws had no effect whatsoever within the territory of another sovereign.[78] Comity sought to reconcile the absolute territorial

74. *See Oetjen,* 246 U.S. at 299; *Ricaud,* 246 U.S. at 306.

75. 246 U.S. at 309–10. The same rationale accounts for the result reached in *Oetjen. See* 246 U.S. at 303.

76. *See, e.g.,* Bazyler, *supra* note 3, at 334.

77. *Id.* at 334 (quoting Underhill v. Hernandez, 65 F. 577, 579 (2d Cir. 1895), *aff'd,* 168 U.S. 250 (1897)).

78. *See* J. STORY, COMMENTARIES ON THE CONFLICT OF LAWS §§ 18, 20, 23, 25, 38 (2d ed. 1841); *see also* The Appollon, 22 U.S. (9 Wheat.) 362, 370 (1824) (Story, J.). As explained by the Supreme Court, comity "is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens." Hilton v. Guyot, 159 U.S. 113, 164 (1895). "[T]he principle of comity is essentially a voluntary recognition of foreign acts based on policy considerations." Zaitzeff & Kunz, *supra* note 6, at 450. The Third Circuit has explained:

> Comity is . . . not a rule of law, but one of practice, convenience, and expediency. Although more than mere courtesy and accommodation, comity does not achieve the force of an imperative or obligation. Rather, it is a nation's expression of understanding which demonstrates due regard both to international duty and convenience and to the rights of persons protected by its own laws.

Somportex Ltd. v. Philadelphia Chewing Gum Corp., 453 F.2d 435, 440 (3d Cir. 1971), *cert. denied,* 405 U.S. 1017 (1972); *see also* Ehrlich-Bober & Co. v. University of Houston, 49 N.Y.2d 574, 580, 404

sovereignty of nation states with the need for the recognition of foreign law in appropriate cases.[79] In this respect, the comity theory was not wholly satisfactory. The theory suffered from the conceptual difficulty that the effectiveness of law was at once founded upon and delimited by absolute territoriality and yet these same laws were entitled to some effect beyond the territorial limits of the sovereign where the laws emanated.[80] Under Story's comity theory, the laws of one nation had effect in another nation only if the latter chose voluntarily to recognize those laws by relaxing its absolute jurisdiction over its territory.[81] The critics of comity sought to reconcile the concept of absolute sovereignty over territory with the notion that in certain cases foreign laws should be recognized in domestic courts not as a matter of grace, but as a matter of law.[82] The critics found their solution in the vested rights theory,[83] which provided at once that law was based upon absolute territoriality and power, but which also provided that acts legally valid within one territory were equally valid in all others.[84]

Thus, while *Oetjen* may have proffered comity as an additional ground for its result, comity cannot wholly account for the mandatory recognition of the foreign acts of state. To account for the binding force of the foreign act, courts had to invoke the vested rights theory.[85]

The act of state doctrine thus had its origins in positivist concepts of power and absolute territoriality as embodied in the vested rights theory of choice of law. Ever since these early Supreme Court cases, courts[86] and commentators[87] have associated the doctrine with power, territoriality, and choice of law.

N.E.2d 726, 730, 427 N.Y.S.2d 604, 608 (1980) ("The doctrine of comity . . . does not of its own force compel a particular course of action. Rather, it is an expression of one State's entirely voluntary decision to defer to the policy of another.").

79. *See* E. SCOLES & P. HAY, *supra* note 49, at 13.

80. *Id.; see also* Cheatham, *supra* note 57, at 367–68.

81. *See supra* note 78; *see also* Cheatham, *supra* note 57, at 373.

82. *See* E. SCOLES & P. HAY, *supra* note 49, at 13.

83. *Id.; see also* Cheatham, *supra* note 57, at 368.

84. *See* E. SCOLES & P. HAY, *supra* note 49, at 13; *see also supra* text accompanying notes 47–48.

85. Comity was accepted as an operational theory in the courts from 1850 to 1900, but by 1918, when *Oetjen* was decided, the vested rights theory was the dominant theory of conflict of laws. *See* E. SCOLES & P. HAY, *supra* note 49, at 13.

86. *See, e.g.*, Occidental of Umm al Quywayn, Inc. v. A Certain Cargo of Petroleum, 577 F.2d 1196, 1200 n.4 (5th Cir. 1978), *cert. denied*, 442 U.S. 928 (1979); Banco Nacional de Cuba v. Sabbatino, 307 F.2d 845 (2d Cir. 1962), *rev'd*, 376 U.S. 398 (1964); Sharon v. Time, Inc., 599 F. Supp. 538, 546 (S.D.N.Y. 1984); Braka v. Bancomer, S.A., 589 F. Supp. 1465, 1470–71 (S.D.N.Y. 1984), *aff'd*, 762 F.2d 222 (2d Cir. 1985).

87. *See, e.g.*, Henkin, *Recollections in Tranquility*, *supra* note 3, at 178–80; Leigh & Sandler, Dunhill: *Toward a Reconsideration of* Sabbatino, 16 VA. J. INT'L L. 685, 709–18 (1976); *see also* RESTATEMENT FOREIGN RELATIONS (Tent. Draft No. 7), *supra* note 17, § 469 note 1.

B. *Modern Theories of the Act of State Doctrine: Principles of Institutional Competence and Federal Supremacy*

In the sixty years between the Supreme Court's first trilogy of act of state decisions and 1964 when the Court decided the landmark case of *Banco Nacional de Cuba v. Sabbatino*,[88] no significant act of state case reached the Supreme Court. In the interim, however, two major shifts occurred in American jurisprudence that had a profound impact upon the development of the act of state doctrine. First, the vested rights theory had been rejected as the dominant theory of conflict of laws.[89] Second, the Supreme Court had established the regime of *Erie Railroad v. Tompkins*.[90]

88. 376 U.S. 398 (1964). Between 1918 and 1964, the Supreme Court intermittently referred to the act of state doctrine, *see, e.g.*, United States v. Pink, 315 U.S. 203, 233 (1941); United States v. Belmont, 301 U.S. 324, 327–28 (1937); Shapleigh v. Mier, 299 U.S. 468, 471 (1937), but did not engage in an extensive treatment of the doctrine until the events of the Cuban revolution precipitated a series of cases involving expropriations by the Cuban government of property from United States citizens. *See infra* text accompanying notes 99–152.

89. Indeed, in 1956 Professor Katzenbach noted that "the theory of 'vested rights' has been brutally murdered." *See* Katzenbach, *supra* note 57, at 1087–88; *see also* Cheatham & Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV. 959, 959 (1952). The major culprits are generally acknowledged to be W. COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS (1942), E. LORENZEN, SELECTED ARTICLES ON THE CONFLICT OF LAWS (1947), and Cavers, *A Critique of the Choice of Law Problem*, 47 HARV. L. REV. 173 (1933). Professor Brainerd Currie has said that Cook's attacks "discredited the vested-rights theory as thoroughly as the intellect of one man can ever discredit the intellectual product of another." B. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 6 (1963).

The principal objection to the vested rights theory was that it gave greater effect to foreign law than to the local law that was the source of the courts' authority. *See* E. SCOLES & P. HAY, *supra* note 49, at 14. Cook's "local law theory" provided that instead of recognizing a foreign-created right, the forum grants a local law remedy that approximates the result that would have obtained under the foreign law. *See* Cook, *The Logical and Legal Bases of the Conflict of Laws*, 33 YALE L.J. 457, 471–88 (1924); *see also* Lorenzen, *Territoriality, Public Policy and the Conflict of Laws*, 33 YALE L.J. 736 (1924). For a judicial formulation of the "local law theory," see Guinness v. Miller, 291 F. 769, 770 (2d Cir. 1923) (L. Hand, J.) ("[N]o court can enforce any law but that of its own sovereign, and, when a suitor comes to a jurisdiction foreign to the place of the tort, he can only invoke an obligation recognized by that sovereign. A foreign sovereign under civilized law imposes an obligation of its own as nearly homologous as possible to that arising in the place where the tort occurs."). Cook's theory bears much resemblance to thought current to the latter half of the twentieth century. *See* E. SCOLES & P. HAY, *supra* note 49, at 15, 32–34.

The Restatement (Second) of Conflict of Laws advocates a balancing approach under which foreign law is applied in appropriate cases. The underlying policy of the Restatement is that courts should apply the law of the state with the "most significant relationship" to the transaction in question. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971).

90. Erie R.R. v. Tompkins, 304 U.S. 64 (1938). The point that *Erie* had important ramifications for the development of the act of state doctrine was first made by Professor Henkin. *See* Henkin, *Foreign Affairs*, *supra* note 3, at 809.

In *Erie Railroad v. Tompkins*, Tompkins was injured by a passing train of the Erie Railroad Co. near Hughestown, Pennsylvania. Under Pennsylvania law, the state courts would have regarded Tompkins as a trespasser and the railroad would not have been liable unless it was guilty of wanton or willful misconduct. Under the "general" law, recognized by the federal courts under Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842), Tompkins had the status of a licensee and the railroad would be liable for ordinary negligence. Since Tompkins was a citizen of Pennsylvania and the railroad was a New York corporation,

Underhill, Oetjen, and *Ricaud* had been decided under the regime of *Swift v. Tyson,*[91] which ruled that federal courts could apply federal common law in matters involving general questions of law, and had to follow state law only with respect to matters of local concern.[92] Under *Swift,* the determination of the conflict of laws was a general question that federal courts were free to decide.[93] By the time *Sabbatino* came before the Supreme Court, the combination of *Erie* and *Klaxon v. Stentor Electric Manufacturing Co.*[94] had established that a federal court exercising jurisdiction on the basis of diversity of citizenship[95] must apply the rules of conflict of laws of the state in which the federal court sits.[96]

Sabbatino was a diversity case, originally filed in the federal District Court for the Southern District of New York.[97] As the *Sabbatino* litigation unfolded, troublesome *Erie* issues lurked in the background. The act of state doctrine was originally rooted in the vested rights theory of choice of law, which was federal law under *Swift v. Tyson.* By the time *Sabbatino* came before the Supreme Court, the Court could no longer ground the act of state doctrine in the field of conflict of laws since to do so would posit the act of state doctrine as an issue of state law, to be decided by the fifty states as they wished, with binding effect upon federal courts.[98] To further complicate matters, the original foundation of the doctrine was no longer viable, whether viewed as a matter of state or federal law, since the vested rights theory had been convincingly discredited. Faced with a doctrine with no currently legitimate foundation at all, the Court needed to supply the act of state doctrine with a valid basis in federal law.

Tompkins was able to bring a diversity action in the federal District Court for the Southern District of New York. Tompkins obtained a judgment for $30,000, which the Second Circuit affirmed. *See* Tompkins v. Erie R.R., 90 F.2d 603 (2d Cir. 1937), *rev'd,* 304 U.S. 64 (1938).

On appeal, Justice Brandeis stated that "[t]he question for decision is whether the oft-challenged doctrine of Swift v. Tyson shall now be disapproved." 304 U.S. at 69. The Supreme Court rejected the rule of *Swift v. Tyson* and "established the general principle that federal courts in diversity cases may not, as to non-federal matters, disregard state law in matters of substantive rights." 1A(2) J. MOORE, W. TAGGART, A. VESTAL & J. WICKER, MOORE'S FEDERAL PRACTICE ¶ 0.304, at 3039 (2d ed. 1985).

91. 41 U.S. (16 Pet.) 1 (1842).

92. 41 U.S. at 18–19.

93. *See* Dygert v. Vermont Loan & Trust Co., 94 F. 913, 915 (9th Cir. 1899); 1A(2) J. MOORE, W. TAGGART, A. VESTAL & J. WICKER, *supra* note 90, ¶ 0.303, at 3028.

94. 313 U.S. 487 (1941). In *Klaxon,* the Supreme Court stated: "We are of opinion that the prohibition declared in Erie R. Co. v. Tompkins . . . against such independent determinations by the federal courts extends to the field of conflict of laws." *Id.* at 496. Thus, federal courts in diversity cases must apply the conflict of laws rules of the state in which they sit. *See id.*

95. *See* 28 U.S.C. § 1332 (1982).

96. 313 U.S. at 496.

97. 307 F.2d 845, 852 (2d Cir. 1962), *rev'd,* 376 U.S. 398 (1964).

98. *See* Henkin, *Foreign Affairs, supra* note 3, at 810.

The facts of *Sabbatino* are as follows. In 1960, Farr, Whitlock & Co. (Farr), an American commodity broker, contracted to purchase Cuban sugar from Compania Azucarera Vertientes-Camaguey de Cuba (CAV), a Cuban corporation owned principally by American nationals.[99] Farr agreed to pay for the sugar in New York upon presentation of proper documentation.[100]

In August 1960, in retaliation for President Eisenhower's restriction of Cuban sugar imports, the Cuban government nationalized all American-owned companies located in Cuba, including CAV.[101] On the day the nationalization decree was issued, CAV's sugar was being loaded onto a ship at a Cuban port.[102] Under the decree, Farr had to obtain the consent of the Cuban government before the ship would be allowed to leave Cuban waters.[103] To obtain this consent, Farr had to enter into contracts, identical to those it had made with CAV, with a bank owned by the Cuban government, which in turn assigned the contracts to Banco Nacional, also a government-owned bank.[104] Subsequently, Banco Nacional tendered the bills of lading to Farr in New York for payment.[105] On the same day, Farr received notice of CAV's claim that as rightful owner of the sugar it was entitled to the proceeds.[106] Faced with the prospect of double liability, Farr refused to pay Banco Nacional.[107] Rather, Farr deposited the proceeds with Sabbatino, a court-appointed receiver of CAV's New York assets, for a judicial determination of the proceeds' rightful owner.[108] Seeking to recover the proceeds, Banco Nacional then brought suit against Sabbatino and Farr in the Southern District of New York.[109] The district court and the Second Circuit Court of Appeals rejected Banco Nacional's claim to the sugar proceeds.[110]

99. 376 U.S. at 401.
100. *Id.*
101. *Id.* at 403.
102. *Id.*
103. *Id.* at 404.
104. *Id.* at 404–05.
105. *Id.* at 405.
106. *Id.*
107. *Id.* at 406.
108. *Id.*
109. *See* Banco Nacional de Cuba v. Sabbatino, 193 F. Supp. 375 (S.D.N.Y. 1961), *aff'd on other grounds*, 307 F.2d 845 (2d Cir. 1962), *rev'd*, 376 U.S. 398 (1964).
110. The district court ruled that the Cuban nationalization decree violated international law because it was retaliatory, discriminatory, and confiscatory and that acts violating international law were not protected by the act of state doctrine. *See id.* The Second Circuit affirmed but relied on a different rationale. The court of appeals relied on the *Bernstein* exception, which removes the bar of the act of state doctrine when the executive indicates that the doctrine should be relaxed. *See infra* note 133. Based upon two letters submitted by the State Department, the Second Circuit held that the *Bernstein* exception removed the bar of the act of state doctrine. *See* 307 F.2d at 858–59.

The Supreme Court reversed.[111] The Court turned first to the foundations of the act of state doctrine and to the issue of whether the doctrine is governed by federal or state law.[112] Justice Harlan rejected the notion that the doctrine is rooted in principles of sovereign immunity and international law.[113] He then found a federal basis for the act of state doctrine in the principle of separation of powers.[114] The doctrine "concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations,"[115] and embodies the considered judgment of the "Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole."[116] Having built the foundation of the doctrine upon the separation of powers principle, Justice Harlan declared that the act of state doctrine "must be treated exclusively as an aspect of federal law."[117] He then recast the doctrine in what is now generally recognized as its "modern formulation":[118]

> [T]he Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law.[119]

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111. 376 U.S. at 439.

112. *Id.* at 421–27.

113. *Id.* at 421. *See also* Callejo v. Bancomer, S.A., 764 F.2d 1101, 1113 n.12 (5th Cir. 1985) (*Sabbatino* rejected notion that act of state doctrine was based on doctrine of sovereign immunity); Libra Bank, Ltd. v. Banco Nacional de Costa Rica, 570 F. Supp. 870, 876 (S.D.N.Y. 1983) (events of Cuban revolution led Supreme Court to rethink doctrine, which was originally linked with principles of sovereign immunity). Professor Henkin has suggested that perhaps Justice Harlan was too hasty in rejecting international law as a basis of the act of state doctrine. *See* Henkin, *Foreign Affairs*, *supra* note 3, at 819.

114. Justice Harlan ruled that the doctrine is not required by the Constitution but has "constitutional underpinnings" in the principle of separation of powers. Banco Nacional de Cuba v. Sabbatino, 376 U.S. at 423.

115. *Id.*

116. *Id.*

117. *Id.* at 425.

118. *See, e.g.*, Kalamazoo Spice Extraction Co. v. Provisional Military Gov't of Socialist Ethiopia, 729 F.2d 422, 424 (6th Cir. 1984); Timberlane Lumber Co. v. Bank of Am. Nat'l Trust & Sav. Ass'n, 549 F.2d 597, 605 (9th Cir. 1976); Frolova v. U.S.S.R., 558 F. Supp. 358, 363 (N.D. Ill. 1983), *aff'd*, 761 F.2d 370 (7th Cir. 1985).

119. 376 U.S. at 428. *Sabbatino's* holding that the bar of the act of state doctrine encompasses acts of state in violation of international law drew intense and immediate criticism. *See, e.g.*, Laylin, *Holding Invalid Acts Contrary to International Law—A Force Toward Compliance*, 1964 AM. SOC'Y INT'L L. PROCEEDINGS 33, 36–39; McDougal, *Act of State in Policy Perspective: The International Law of an International Economy*, in PRIVATE INVESTORS ABROAD—STRUCTURES AND SAFEGUARDS 327 (V. Cameron ed. 1966); Stevenson, *The State Department and* Sabbatino—*"Ev'n Victors Are by Victories Undone,"* 58 AM. J. INT'L L. 707, 707–08 (1964). Within eight months after *Sabbatino* was decided, Congress enacted a statute adopting an international law exception to the act of state doctrine. The statute,

Justice Harlan thereby accomplished the important goal of establishing a justification of the act of state doctrine that had a valid basis in federal law. The achievement of this goal, however, had significant ramifications in the development and understanding of the doctrine. The classic act of state doctrine, based upon the recognition of independent sovereignty and foreign-created rights, is a doctrine of external deference.[120] Justice Harlan's version of the doctrine, founded on the separation of powers principle and stressing notions of institutional competence, is a doctrine of internal deference.[121] By recasting the act of state doctrine as one of internal deference, *Sabbatino* steered the development of the doctrine on a course already charted by theories of judicial abstention and the political question doctrine—a course subsequent decisions were eager to follow.

Sabbatino represents the last time a Supreme Court majority was able to agree on the act of state doctrine. In its two most recent cases considering the act of state doctrine, the Court issued fractured pronouncements on the doctrine, spawning diverse views in the lower courts about the nature of the doctrine.

Notwithstanding any other provision of law, no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right is asserted by any party including a foreign state (or a party claiming through such state) based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of that state in violation of the principles of international law, including the principles of compensation and the other standards set out in this subsection: *Provided*, that this subparagraph shall not be applicable (1) in any case in which an act of a foreign state is not contrary to international law or with respect to a claim of title or other right acquired pursuant to an irrevocable letter of credit of not more than 180 days duration . . . or (2) in any case with respect to which the President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States and a suggestion to this effect is filed on his behalf in that case with the court.

Foreign Assistance Act of 1964, Pub. L. No. 88-633, § 301(d)(4), 78 Stat. 1009 (1964) (current version at 22 U.S.C. § 2370(e)(2) (1982)) (amending the Foreign Assistance Act of 1961).

The *Sabbatino* amendment has been narrowly construed. The applicability of the statute has been limited to cases involving confiscated property brought into the United States. *See* Empresa Cubana Exportadora de Azucar y Sus Derivados v. Lamborn & Co., 652 F.2d 231, 237 (2d Cir. 1981) (citing Banco Nacional de Cuba v. First Nat'l City Bank, 431 F.2d 394 (2d Cir. 1970), *rev'd on other grounds*, 406 U.S. 759 (1972)). The statute does not apply to contract claims, *see, e.g.*, Menendez v. Saks & Co., 485 F.2d 1355, 1372 (2d Cir. 1973), *rev'd on other grounds sub nom.* Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976); Libyan Am. Oil Co. v. Socialist People's Libyan Arab Jamahirya, 482 F. Supp. 1175, 1179 (D.D.C. 1980); French v. Banco Nacional de Cuba, 23 N.Y.2d 46, 61–62, 242 N.E.2d 704, 714–15, 295 N.Y.S.2d 433, 447–48 (1968), or to expropriations of the property of a foreign sovereign's own nationals. *See* F. Palicio y Compania, S.A. v. Brush, 256 F. Supp. 481, 489 (S.D.N.Y. 1966), *aff'd mem.*, 375 F.2d 1011 (2d Cir.), *cert. denied*, 389 U.S. 830 (1967).

120. *See* R. FALK, INTERNATIONAL SOCIETY, *supra* note 3, at 417.

121. *See id.*

The legal dispute in *First National City Bank (Citibank) v. Banco Nacional de Cuba,*[122] decided in 1972, was precipitated by the Cuban government's expropriations of First National City Bank (Citibank) branches in Cuba.[123] Citibank had extended a $15 million loan to a predecessor of Banco Nacional de Cuba.[124] In retaliation for the seizure of its branches, Citibank sold the collateral pledged to secure the loan. The sale produced an excess of almost $2 million over and above the principal and unpaid interest due and Banco Nacional brought suit to recover the excess proceeds.[125] Citibank, by way of setoff and counterclaim, claimed the excess proceeds as damages for the confiscation of its Cuban branches.[126]

The district court held that the act of state doctrine did not shield the Cuban expropriations because the Hickenlooper Amendment to the Foreign Assistance Act of 1964[127] explicitly removed the bar of the doctrine in cases involving confiscations by a foreign sovereign.[128] The Second Circuit reversed, and in two separate opinions, held that the Hickenlooper Amendment did not defeat application of the act of state doctrine and that *Sabbatino* required a judgment in favor of Banco Nacional.[129]

In a decision that produced four separate opinions, the Supreme Court reversed the Second Circuit. Justice Rehnquist, joined only by Chief Justice Burger and Justice White, found dispositive a statement from the State Department that the act of state doctrine should not bar Citibank's counterclaim.[130] Emphasizing the "exclusive competence of the Executive Branch in the field of foreign affairs,"[131] Justice Rehnquist pronounced that "the act of state doctrine justifies its existence primarily on the basis that

122. 406 U.S. 759 (1972).

123. *Id.* at 760.

124. *Id.*

125. *Id.* at 760–61.

126. *Id.* at 761.

127. Pub. L. No. 88-633, § 301(d)(4), 78 Stat. 1009, 1012–13 (1964) (current version at 22 U.S.C. § 2370(e)(2) (1982)); *see supra* note 119.

128. Banco Nacional de Cuba v. First Nat'l City Bank, 270 F. Supp. 1004, 1007 (S.D.N.Y. 1967), *rev'd,* 431 F.2d 394 (2d Cir. 1970), *vacated,* 400 U.S. 1019 (1971).

129. The Second Circuit's first opinion reversing the district court was vacated and remanded by the Supreme Court for reconsideration in light of the State Department's views on the case. *See* Banco Nacional de Cuba v. First Nat'l City Bank, 431 F.2d 394 (2d Cir. 1970), *vacated,* 400 U.S. 1019 (1971). Although the State Department urged that the act of state doctrine should not be applied, the Second Circuit decided not to alter its initial decision and reaffirmed the applicability of the doctrine to bar Citibank's counterclaim. *See* Banco Nacional de Cuba v. First Nat'l City Bank, 442 F.2d 530, 532 (2d Cir. 1971), *rev'd,* 406 U.S. 759 (1972).

130. First Nat'l City Bank (Citibank) v. Banco Nacional de Cuba, 406 U.S. 759, 768 (1972). The position of the State Department was set forth in a letter from its Legal Adviser, John Stevenson. The full text of the letter is reproduced in the appendix to the Second Circuit's decision. *See* Banco Nacional de Cuba v. First Nat'l City Bank, 442 F.2d at 536–38.

131. *Citibank,* 406 U.S. at 766 (footnote omitted).

juridical review of acts of state of a foreign power could embarrass the conduct of foreign relations by the political branches of the government."[132] Given the letter from the State Department advising the judiciary to decide the merits of Citibank's claim, there was no possibility that judicial action would hinder the executive's conduct of foreign affairs. In so ruling, Justice Rehnquist declared, "[W]e of course adopt and approve the so-called Bernstein exception," which removes the bar of the act of state doctrine when the executive branch deems application of the doctrine unnecessary.[133]

Justice Rehnquist's endorsement of the *Bernstein* exception, joined only by Chief Justice Burger and Justice White, was rejected by the other six members of the Court.[134]

In his dissent, Justice Brennan viewed the adoption of the *Bernstein* exception as tantamount to an abdication of judicial responsibility.[135] According to Justice Brennan, nothing in *Sabbatino* offered any support for Justice Rehnquist's view that the doctrine was designed primarily to avoid embarrassment to the political branches.[136] Rather, Justice Brennan wrote, "*Sabbatino* held that the validity of a foreign act of state in certain circumstances is a 'political question' not cognizable in our courts."[137]

132. *Id.* at 765.

133. *Id.* at 768. The *Bernstein* exception was established in Bernstein v. Van Heyghen Freres Societe Anonyme, 163 F.2d 246 (2d Cir.), *cert. denied*, 332 U.S. 772 (1947). In that case, Arnold Bernstein owned all of the shares of a German corporation known as the "Arnold Bernstein Line," which in turn was the owner of a ship called the "Gandia." 163 F.2d at 247. In 1937, Bernstein was imprisoned by Nazi officials who forced him to transfer all of his shares of the corporation's stock to Marius Boeger. Boeger, in turn, transferred the shares to defendant, a Belgian corporation. Bernstein brought suit in federal district court for damages resulting from detention of the vessel, for profits derived by defendant from use of the vessel, and for the insurance proceeds collected by the defendant upon the wartime sinking of the ship. *Id.*

Judge Learned Hand held that "the only relevant consideration is how far our Executive has indicated any positive intent to relax the doctrine that our courts shall not entertain actions of the kind at bar." *Id.* at 251. Finding no such indication, Judge Hand invoked the act of state doctrine and affirmed the district court's dismissal of the complaint.

Two years later, Judge Augustus Hand, following Learned Hand's decision, affirmed the dismissal of Bernstein's complaint in a related case on the ground that the complaint, if upheld, would cause the court to examine the validity of actions by the German government. Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, 173 F.2d 71, 75–76 (2d Cir. 1949), *modified*, 210 F.2d 375 (2d Cir. 1954).

Shortly after Augustus Hand's decision, the State Department submitted a letter stating that it was the policy of the executive to relieve American courts from any restraint upon their power to pass upon the validity of acts of the Nazi government. 210 F.2d at 376. Accordingly, the court modified its previous order, "striking out all restraints based on the inability of the court to pass on acts of officials in Germany during the period in question." *Id.*

134. *See Citibank*, 406 U.S. at 772–73 (Douglas, J., concurring in the result); *id.* at 773 (Powell, J., concurring in the judgment); *id.* at 776–78 (Brennan, J., dissenting, joined by Justices Stewart, Marshall, and Blackmun).

135. *Id.* at 790.

136. *Id.* at 785.

137. *Id.* at 787–88.

Drawing upon *Baker v. Carr,*[138] Justice Brennan set forth five factors that "point toward the existence of a 'political question.'"[139] By equating the act of state doctrine with the political question doctrine, Justice Brennan placed the act of state doctrine firmly within the exclusive province of the judiciary because the "Executive Branch, however extensive its powers in the area of foreign affairs, cannot by simple stipulation change a political question into a cognizable claim."[140]

The Justices once again failed to achieve a majority opinion on act of state issues in *Alfred Dunhill of London, Inc. v. Republic of Cuba.*[141] This dispute arose out of the Cuban government's confiscation of five cigar manufacturing companies, all owned principally by Cuban nationals.[142] Following confiscation, the Cuban government appointed "interventors" to run the cigar companies, which continued to ship cigars to American importers, including Alfred Dunhill of London, Inc.[143]

The former owners of the cigar companies fled to the United States and brought suit against Dunhill and other importers for trademark infringement and the purchase price of any cigars that had been shipped to the importers.[144] The issue was whether the act of state doctrine was a viable defense by the interventors who refused to reimburse the importers for sums that the importers owed the original owners for preintervention cigar shipments, but had mistakenly paid to the interventors.[145]

The district court held that the original owners were entitled to payments for the shipments made prior to the appointment of the interventors and that the importers were entitled to recover from the interventors amounts mistakenly paid for the preintervention shipments.[146] The Second Circuit,

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138. 369 U.S. 186 (1962).

139. *Citibank,* 406 U.S. at 788. Justice Brennan's five factors are:

> [T]he absence of consensus on the applicable international rules, the unavailability of standards from a treaty or other agreement, the existence and recognition of the Cuban Government, the sensitivity of the issues to national concerns, and the power of the Executive alone to effect a fair remedy for all United States citizens who have been harmed . . . .

Id.

140. *Id.* at 789. Justice Douglas believed that the case was not governed by *Sabbatino* but by notions of "[f]air dealing [that] require[] allowance of the setoff to the amount of the claim on which this suit is brought." *Id.* at 772. Justice Powell explicitly rejected the *Bernstein* exception, *id.* at 773, and stated that "[u]nless it appears that an exercise of jurisdiction would interfere with delicate foreign relations conducted by the political branches, . . . federal courts have an obligation to hear cases such as this." *Id.* at 775–76. Justice Powell concurred in the judgment because he saw no danger of judicial interference with the conduct of foreign relations by the political branches. *Id.* at 776.

141. 425 U.S. 682 (1976).

142. *Id.* at 685.

143. *Id.*

144. *Id.*

145. *Id.* at 684.

146. Menendez v. Faber, Coe & Gregg, Inc., 345 F. Supp. 527, 542, 546 (S.D.N.Y. 1972), *aff'd in*

affirming in part and reversing in part, held that the interventors' obligation to repay the importers had been repudiated by conduct sufficient to be deemed an act of state.[147]

In a five to four opinion, the Supreme Court reversed the Second Circuit and held that the interventors had not satisfied their burden of proving an act of state.[148] In particular, the Court ruled that the interventors had not sufficiently established that their actions were "the public act of those with authority to exercise sovereign powers and was entitled to respect in our courts."[149]

Justice White's plurality opinion added yet another fertile ground of controversy to act of state jurisprudence. In a part of the opinion that won the support of only Chief Justice Burger, Justices Powell and Rehnquist, Justice White stated, "We decline to extend the act of state doctrine to acts committed by foreign sovereigns in the course of their purely commercial operations."[150]

In a dissenting opinion joined by Justices Brennan, Stewart, and Blackmun, Justice Marshall questioned whether "the act of state doctrine can be triggered only by a 'statute, decree, order, or resolution' of a foreign government."[151] Justice Marshall contended that "an act of state need not be formalized in any particular manner [and] it need not take the form of active, rather than passive, conduct."[152]

The cases discussed above, *Underhill, Oetjen,* and *Ricaud,* along with *Sabbatino, Citibank,* and *Dunhill,* comprise the whole of the Supreme

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part and rev'd in part sub nom. Menendez v. Saks & Co., 485 F.2d 1355 (2d Cir. 1973), *rev'd on other grounds sub nom.* Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976).

147. Menendez v. Saks & Co., 485 F.2d 1355, 1371 (2d Cir. 1973), *rev'd on other grounds sub nom.* Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976).

148. Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 694 (1976).

149. *Id.* Justice White's plurality opinion stated that "[n]o statute, decree, order, or resolution of the Cuban Government itself was offered in evidence indicating that Cuba had repudiated its obligations in general or any class thereof or that it had as a sovereign matter determined to confiscate the amounts due [Dunhill and the other] foreign importers." *Id.* at 695.

150. *Id.* at 706. Justice White's plurality opinion approving a commercial activity exception has caused disagreement between the circuits. *Compare* Arango v. Guzman Travel Advisors Corp., 621 F.2d 1371, 1380–81 (5th Cir. 1980) (act of state doctrine does not preclude judicial resolution of all commercial consequences stemming from the occurrence of all public acts) *and* Hunt v. Mobil Oil Corp., 550 F.2d 68, 73 (2d Cir.), *cert. denied,* 434 U.S. 984 (1977) (recognizing commercial activity exception) *with* MOL, Inc. v. Peoples Republic of Bangladesh, 572 F. Supp. 79, 83 (D. Or. 1983) (act of state doctrine not diluted by commercial activity exception), *aff'd,* 736 F.2d 1326 (9th Cir.), *cert. denied,* 469 U.S. 1037 (1984) *and* Central Cartage Co. v. The Queen, 576 F. Supp. 1416, 1418 (E.D. Mich. 1983) (commercial nature of sovereign activity not determinative on issue of whether act of state doctrine applies), *aff'd without opinion,* 751 F.2d 384 (6th Cir. 1984).

151. *Dunhill,* 425 U.S. at 718.

152. *Id.* at 719–20. The dissenters disagreed with Justice White's recognition of a commercial activity exception on the ground that "[t]he carving out of broad exceptions to the doctrine is fundamentally at odds with the careful case by case approach adopted in *Sabbatino.*" *Id.* at 728.

Court's guidance on the act of state doctrine. The Supreme Court's most recent pronouncements established that the act of state doctrine is founded primarily on judicial deference to the executive's role in the conduct of foreign affairs. Based on their interpretation of the Supreme Court's directives, the lower federal courts quickly took the lead in developing the act of state doctrine as a broad barrier to judicial action, transforming the doctrine into an expansive doctrine of nonjusticiability.

C. Development of the Act of State Doctrine in the Lower Courts

1. The Act of State Doctrine as a Broad Doctrine of Nonjusticiability

One of the most important and often cited cases in the trend of lower courts to use the act of state doctrine to bar judicial action is *Hunt v. Mobil Oil Corp.*[153] In response to Colonel Qadhafi's demand for a greater share of profits and fearful of similar pressure from other oil producing nations in the Persian Gulf area, seven major oil companies and a number of independent producers decided, during a meeting held in New York City, to present a united front against these escalating demands.[154] Hunt, an independent oil producer, charged the seven major oil producers with violating the antitrust laws.[155] Hunt alleged that based on assurances from the seven oil companies, he rejected Colonel Qadhafi's demands for greater profits.[156] As a result of Hunt's recalcitrance, the Libyan government terminated his right to produce and export oil and nationalized all of Hunt's assets.[157] According to Hunt, the seven oil companies encouraged him to resist the Libyan demands because they knew that such refusal would lead to the confiscation of his assets and thus eliminate him from competition.[158] Hunt charged the seven oil companies with violations of the Sherman Act and the Wilson Tariff Act.[159]

Hunt had carefully framed his pleadings to avoid naming Libya as a defendant or in any way suggesting that Libya was a co-conspirator of the seven oil companies.[160] Nonetheless, the district court held that this claim was barred by the act of state doctrine because it "clearly would require inquiry into acts and conduct of Libyan officials, Libyan affairs and Libyan

153. 550 F.2d 68 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977).
154. 550 F.2d at 71.
155. *Id.* at 70.
156. *Id.* at 71–72.
157. *Id.* at 72.
158. *Id.*
159. *Id.* at 72 n.2 (citing the Sherman Act, 15 U.S.C. § 1 (1982), and the Wilson Tariff Act, 15 U.S.C. § 8 (1982)).
160. *Id.* at 72.

policies with respect to plaintiff's as well as other oil producers' properties and the underlying reasons for the Libyan government's actions."[161]

On appeal, the Second Circuit agreed that the act of state doctrine applied because Hunt's claim would require the court to inquire into the motives of Libya and "a judgment on the sovereign acts of Libya . . . is non-justiciable."[162] The Second Circuit thus transformed the act of state doctrine into a doctrine of nonjusticiability and into what amounts to an automatic bar to any claim involving any foreign sovereign governmental act.[163]

Another influential and often cited decision is a 1981 decision by the Ninth Circuit. In *International Association of Machinists & Aerospace Workers (IAM) v. OPEC*,[164] IAM, a labor union, alleged that the high price of oil and petroleum-derived products was caused by OPEC's price-setting activities, which violated United States antitrust laws.[165] The district court dismissed the complaint on the ground that the defendants were entitled to sovereign immunity.[166] On appeal, the Ninth Circuit affirmed on the basis of the act of state doctrine.[167]

After paying homage to Chief Justice Fuller's famous dictum in *Underhill*, the court stated that "[t]he act of state doctrine is similar to the political question doctrine in domestic law."[168] The court then noted that application of the doctrine requires a balancing of factors.[169] First, the executive branch has the primary role in the conduct of foreign relations.[170] Second, there is a "public interest factor"[171] in according respect to the sovereignty of foreign

161. Hunt v. Mobil Oil Corp., 410 F. Supp. 10, 24 (S.D.N.Y. 1975), *aff'd*, 550 F.2d 68 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977).

162. 550 F.2d at 73.

163. *Hunt* has been criticized for its expansive interpretation of the doctrine. In Industrial Inv. Dev. Corp. v. Mitsui & Co., 594 F.2d 48 (5th Cir. 1979), *cert. denied*, 445 U.S. 903 (1980), the court stated:

> *Hunt* has been criticized for encouraging use of the act of state doctrine as a shield by private conspirators who are able to include some foreign governmental act in their anticompetitive scheme. . . . Precluding all inquiry into the motivation behind or circumstances surrounding the sovereign act would uselessly thwart legitimate American goals where adjudication would result in no embarrassment to executive department action.

594 F.2d at 55 (footnote omitted). *See also* Compania de Gas de Nuevo Laredo, S.A. v. Entex Inc., 686 F.2d 322, 325 (5th Cir. 1982); Note, *Sherman Act Jurisdiction and the Acts of Foreign Sovereigns*, 77 COLUM. L. REV. 1247 (1977) [hereinafter Note, *Sherman Act Jurisdiction*]; Note, *The Act of State Doctrine: Antitrust Conspiracies to Induce Foreign Sovereign Acts*, 10 N.Y.U. J. INT'L L. & POL. 495 (1978).

164. 649 F.2d 1354 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982).

165. 649 F.2d at 1355.

166. 477 F. Supp. 553, 569 (C.D. Cal. 1979), *aff'd on other grounds*, 649 F.2d 1354 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982).

167. 649 F.2d 1354, 1361–62.

168. *Id.* at 1358.

169. *Id.* at 1359.

170. *Id.*

171. *Id.* at 1360.

states that act in a public manner.[172] Third, the availability of oil and the world energy crisis are of grave concern to the United States and to "the foreign policy arms of the executive and legislative branches."[173] Finally, there is a lack of internationally accepted legal principles concerning the legality of a conspiracy in restraint of trade. According to the court, "the record reveals no international consensus condemning cartels, royalties, and production agreements."[174] Given these factors, the Ninth Circuit concluded that the case should be dismissed under the act of state doctrine.[175]

OPEC and *Hunt* are at the vanguard of a growing judicial trend that views the act of state doctrine as a broad doctrine of nonjusticiability.[176] While some courts disagree with the expansive views of *OPEC* and *Hunt*,[177] these two cases continue to be among the most influential and often cited of all lower court opinions on the act of state doctrine.[178]

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172. *Id.*

173. *Id.* at 1361.

174. *Id.* at 1361 (footnote omitted).

175. *Id.*

176. *See, e.g.*, DeRoburt v. Gannett Co., 733 F.2d 701, 703 (9th Cir. 1984) (act of state doctrine bars judicial inquiry into motivation of foreign sovereign even where foreign sovereign itself invites such inquiry), *cert. denied*, 105 S. Ct. 909 (1985); Clayco Petroleum Corp. v. Occidental Petroleum Corp., 712 F.2d 404, 407 (9th Cir. 1983) (plaintiffs' bribery claim required examination of foreign sovereign's motivation and was thus barred by act of state doctrine), *cert. denied*, 464 U.S. 1040 (1984); Empresa Cubana Exportadora de Azucar y Sus Derivados v. Lamborn & Co., 652 F.2d 231, 237 (2d Cir. 1981) (mechanical application of act of state doctrine); MOL, Inc. v. Peoples Republic of Bangladesh, 572 F. Supp. 79, 85 (D. Or. 1983) (inquiry into purpose of foreign sovereign act barred by act of state), *aff'd*, 736 F.2d 1326 (9th Cir.), *cert. denied*, 469 U.S. 1036 (1984); *see also* Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo of Petroleum, 577 F.2d 1196, 1201–05 (5th Cir. 1978) (using political question doctrine to affirm district court dismissal on basis of act of state doctrine), *cert. denied*, 442 U.S. 928 (1979).

177. For an example of judicial disagreement with the *OPEC* approach, see Judge Sofaer's discussion in Sharon v. Time, Inc., 599 F. Supp. 538, 548–53 (S.D.N.Y. 1984). For criticism of the *Hunt* decision, see Williams v. Curtiss-Wright Corp., 694 F.2d 300, 304 n.5 (3d Cir. 1982); Industrial Inv. Dev. Corp. v. Mitsui & Co., 594 F.2d 48, 54–55 (5th Cir. 1979), *cert. denied*, 445 U.S. 903 (1980).

Other cases have, without explicitly disagreeing with *OPEC* or *Hunt*, adopted a less expansive approach to the doctrine. *See, e.g.*, Ramirez de Arellano v. Weinberger, 745 F.2d 1500, 1534 (D.C. Cir. 1984) (en banc) (placing burden on party asserting act of state defense to show that no exception to the doctrine bars its application), *vacated mem.*, 105 S. Ct. 2353 (1985); Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 304–06, 310 (2d Cir. 1981) (examining motivation and purpose of act of foreign sovereign and finding act of state doctrine inapplicable); Rasoulzadeh v. Associated Press, 574 F. Supp. 854, 857–60 (S.D.N.Y. 1983) (distinguishing *Hunt* and relying on *Texas Trading* to find act of state doctrine inapplicable), *aff'd without opinion*, 767 F.2d 908 (2d Cir. 1985).

178. *See, e.g.*, DeRoburt v. Gannett Co., 733 F.2d 701, 703 (9th Cir. 1984) (citing *Hunt*), *cert. denied*, 105 S. Ct. 909 (1985); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 803 (D.C. Cir. 1984) (citing both *Hunt* and *OPEC*), *cert. denied*, 105 S. Ct. 1354 (1985); Clayco Petroleum Corp. v. Occidental Petroleum Corp., 712 F.2d 404, 407 (9th Cir. 1983) (same), *cert. denied*, 464 U.S. 1040 (1984); Associated Container Transp. (Austl.), Ltd. v. United States, 705 F.2d 53, 61–62 (2d Cir. 1983) (same); Sharon v. Time, Inc., 599 F. Supp. 538, 546–47 (S.D.N.Y. 1984) (citing *OPEC*); Libra Bank, Ltd. v. Banco Nacional de Costa Rica, 570 F. Supp. 870, 885 (S.D.N.Y. 1983) (same).

2. *Application of the Act of State Doctrine to Cases Involving Indefinitely Situated Property*

With the rise of the international debt crisis[179] and the increase in international business transactions, courts began to apply the act of state doctrine to sovereign acts affecting intangible property and contract rights. But, due to the territorial nature of the doctrine, courts found difficulty in applying it to cases involving intangible property. Under the doctrine's traditional formulation, confiscations by a foreign sovereign of property within its own territory are protected from judicial inquiry by the act of state doctrine.[180] On the other hand, where a foreign sovereign attempts to seize tangible property within the United States, the act of state doctrine does not apply and United States courts are free to judge the validity of the foreign act according to domestic law.[181] In most cases, United States courts will not recognize attempts by a foreign sovereign to seize property in the United States because of the strong public policy against confiscations without compensation.[182] While locating the situs of property did not present difficulty when the cases involved tangible property, courts became perplexed when they were required to find a situs for intangible property.[183]

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179. For background on the international debt crisis, see Eskridge, *Les Jeux Sont Faits: Structural Origins of the International Debt Problem*, 25 VA. J. INT'L L. 281 (1985). In 1973, the amount of borrowing from private creditors totaled $32 billion. *See* WORLD BANK, DEBT AND THE DEVELOPING WORLD: CURRENT TRENDS AND PROSPECTS at xxiii (1984). At the end of 1983, the major Latin American debtors alone—Brazil, Mexico, Argentina, Venezuela, Chile, Peru, and Colombia—owed more than $300 billion; interest payments alone represented about 40% of all their export revenues and total debt service equaled about 60% of earnings. *See* Kissinger, *It's a Crisis. It Can be Solved.*, Washington Post, June 24, 1984, at B8, col. 1. For a concise history of the origins of Mexico's debt crisis and current efforts at resolving these problems, see Tapia, *Mexico's Debt Restructuring: The Evolving Solution*, 23 COLUM. J. TRANSNAT'L L. 1 (1984).

180. In Republic of Iraq v. First Nat'l City Bank, 353 F.2d 47 (2d Cir. 1965), *cert. denied*, 382 U.S. 1027 (1966), the Second Circuit explained the territorial limitation to the act of state doctrine:

> Under the traditional application of the act of state doctrine, the principle of judicial refusal of examination applies only to a taking by a foreign sovereign of property within its own territory . . .; when property confiscated is within the United States at the time of the attempted confiscation, our courts will give effect to acts of state "only if they are consistent with the policy and law of the United States."

Id. at 51 (citations omitted); *see also* Zaitzeff & Kunz, *supra* note 6, at 450–51; Note, *Rehabilitation and Exoneration*, *supra* note 3, at 623–31.

181. *See Republic of Iraq*, 353 F.2d at 51; RESTATEMENT (SECOND) CONFLICT OF LAWS § 90 (1971).

182. *See, e.g.*, Menendez v. Saks & Co., 485 F.2d 1355, 1364 (2d Cir. 1973), *rev'd on other grounds sub nom.* Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976); Libra Bank, Ltd. v. Banco Nacional de Costa Rica, 570 F. Supp. 870, 882 (S.D.N.Y. 1983).

183. The Fifth Circuit has noted this difficulty:

> The situs of intangible property is about as intangible a concept as is known to the law. The situs may be in one place for ad valorem tax purposes . . .; it may be in another place for venue purposes, *i.e.*, garnishment . . .; it may be in more than one place for tax purposes in certain circumstances . . .;

The limits of traditional act of state analysis as applied to intangible property were quickly reached in a series of cases involving the expropriation of foreign branches of American banks.[184] In each case, a new government had risen to power and had expropriated either the entire branch office or a depositor's account at the branch office.[185] The depositor then sought payment of the foreign branch deposit from the main office of the American bank in the United States. As a defense, the banks claimed that the debts[186] were located within the foreign nations and that the foreign sovereigns' expropriation of the debts had extinguished the banks' obligations to the depositor.

To determine the situs of the debt, the courts relied on the analysis set forth many years before in *Harris v. Balk.*[187] Under *Harris,* a debt is located wherever the court can obtain personal jurisdiction over the debtor.[188] But, using this analysis, courts reached inconsistent results in cases presenting similar circumstances. One court held that the foreign sovereign had jurisdiction over the local branch and its expropriation of the

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it may be in still a different place when the need for establishing its true situs is to determine whether an overriding national concern, like the application of the Act of State Doctrine is involved.

Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co., 392 F.2d 706, 714–15 (5th Cir.) (citations omitted), *cert. denied,* 393 U.S. 924 (1968).

184. *See, e.g.,* Garcia v. Chase Manhattan Bank, N.A., 735 F.2d 645 (2d Cir. 1984); Vishipco Line v. Chase Manhattan Bank, N.A., 660 F.2d 854 (2d Cir. 1981), *cert. denied,* 459 U.S. 976 (1982); Perez v. Chase Manhattan Bank, N.A., 61 N.Y.2d 460, 463 N.E.2d 5, 474 N.Y.S.2d 689, *cert. denied,* 469 U.S. 966 (1984).

185. *See Garcia,* 735 F.2d at 647 (seizure of account held in foreign branch); *Vishipco,* 660 F.2d at 857 (seizure of foreign branch office); *Perez,* 61 N.Y.2d at 466, 463 N.E.2d at 7, 474 N.Y.S.2d at 691 (seizure of account deposited in foreign branch).

186. The relationship of a bank to a depositor is that of debtor and creditor and the obligation of the bank to pay the deposit is a debt. *See Vishipco,* 660 F.2d at 864; 10 AM. JUR. 2D *Banks* § 339, at 301 (1963 & Supp. 1986) (relationship between bank and its depositor is that of debtor-creditor); Comment, *Debt Situs, supra* note 6, at 647 (same).

187. 198 U.S. 215 (1905). In *Harris,* a creditor in Maryland garnished a debt owed by a North Carolina resident to a second creditor, also a North Carolina resident. The Supreme Court upheld the garnishment of the debt based upon the temporary presence of the debtor in Maryland. *Harris* was substantially overruled on its facts by the Supreme Court in Shaffer v. Heitner, 433 U.S. 186, 212 n.39 (1977), which held that the attachment of the debt in *Harris* to obtain personal jurisdiction over the debtor did not meet the due process requirements of minimum contacts as set forth in International Shoe Co. v. Washington, 326 U.S. 310 (1945). The *Harris* holding as to debt situs is still valid in the act of state context. *See* Kuntsammlungen zu Weimar v. Elicofon, 678 F.2d 1150, 1160 (2d Cir. 1982); *Vishipco,* 660 F.2d at 862.

188. The *Harris* Court stated:

> The obligation of the debtor to pay his debt clings to and accompanies him wherever he goes. He is as much bound to pay his debt in a foreign State when therein sued upon his obligation by his creditor, as he was in the State where the debt was contracted . . . . This obligation can be enforced by the courts of the foreign State after personal service of process therein, just as well as by the courts of the domicil of the debtor.

198 U.S. at 222–23.

branch effectively extinguished the debt owed by the branch to the depositor.[189] Another court, on almost identical facts, held that the doctrine did not apply because the bank gave the depositor an implied promise to pay the deposit at the home office.[190] A third case held that because the head office had abandoned its local branch before the insurgents could seize the physical property of the local branch, the foreign sovereign no longer had jurisdiction over the debtor and the debt had "sprung back and clung" to the main office.[191]

In 1985, the Second Circuit further compounded the confusion surrounding the doctrine's application to intangible property in *Allied Bank International v. Banco Credito Agricola de Cartago.*[192] Allied Bank had acted as the agent for a syndicate of banks in the issuance of promissory notes to three Costa Rican banks, all wholly owned by the Costa Rican government.[193] The notes were to be repaid in New York City in installments of United States dollars.[194] The Costa Rican banks made payments on schedule until August 1981, when, in response to an economic crisis, the Central Bank of Costa Rica enacted restrictions on foreign currency transactions.[195] In effect, these currency regulations imposed a moratorium on repayment by the Costa Rican banks of the loan made by the Allied Bank syndicate.[196]

189. Perez v. Chase Manhattan Bank, N.A., 61 N.Y.2d 460, 473, 463 N.E.2d 5, 11, 474 N.Y.S.2d 689, 695, *cert. denied,* 469 U.S. 966 (1984). Under the separate entity doctrine, a long-established rule of banking law, a bank that accepts a deposit at one branch is not liable to return the deposit at another branch. *See* Bluebird Undergarment Corp. v. Gomez, 139 Misc. 742, 744–45, 249 N.Y.S. 319, 320–21 (N.Y. Civ. Ct. 1931). Deposits made at a branch bank are payable there and there only, unless the branch is closed by the main office or the depositor's demand for payment is wrongfully refused by the branch; in that case, demand will lie against the main office. *See id.* For a history of the separate entity doctrine, see Heininger, *Liability of U.S. Banks for Deposits Placed in Their Foreign Branches,* 11 LAW & POL'Y INT'L BUS. 903, 934–44 (1979); Logan & Kantor, *Deposits at Expropriated Foreign Branches of U.S. Banks,* 1982 U. ILL. L. REV. 333, 340–41. The separate entity doctrine continues to be valid today. *See* Hoffman & Deming, *supra* note 6, at 498.

190. Garcia v. Chase Manhattan Bank, N.A., 735 F.2d 645, 649 (2d Cir. 1984).

191. Vishipco Line v. Chase Manhattan Bank, N.A., 660 F.2d 854, 862 (2d Cir. 1981), *cert. denied,* 459 U.S. 976 (1982) (citing Heininger, *supra* note 189, at 975).

192. 757 F.2d 516 (2d Cir.), *cert. dismissed,* 106 S. Ct. 30 (1985).

193. *Allied Bank,* 757 F.2d at 518.

194. *Id.* at 518–19.

195. *Id.*

196. *Id.* The Costa Rican decree prohibited all Costa Rican banks from repaying debt to foreign banks in foreign currency without the approval of the Central Bank. *Id.* at 519. The Central Bank refused to authorize the Costa Rican banks to pay Allied Bank. *Id.* In November, 1981, the President of Costa Rica and the Minister of Finance issued a decree preventing all public entities of Costa Rica, including the Costa Rican banks, from making any external debt repayments pending resolution of the entire Costa Rican external debt situation. *Id.*

Allied Bank brought suit in the Southern District of New York to enforce the loan agreement. In response, the Costa Rican banks asserted that the currency decrees were acts of state, not subject to judicial inquiry. The district court accepted the act of state defense.[197]

The Second Circuit first affirmed the district court,[198] but on rehearing, reversed.[199] In its opinion on rehearing, the court of appeals reasoned that

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197. The district court stated:

> A judgment in favor of Allied in this case would constitute a judicial determination that defendants must make payments contrary to the directives of their government. This puts the judicial branch of the United States at odds with policies laid down by a foreign government on an issue deemed by that government to be of central importance. Such an act by this court risks embarrassment to the relations between the executive branch of the United States and the government of Costa Rica.

Allied Bank, 566 F. Supp. 1440, 1444 (S.D.N.Y. 1983), *aff'd*, 733 F.2d 23 (2d Cir. Apr. 23, 1984) (published in advanced sheets only), *withdrawn and vacated*, 757 F.2d 516 (2d Cir.), *cert. dismissed*, 106 S. Ct. 30 (1985). *See also supra* note 4.

198. Allied Bank Int'l v. Banco Credito Agricola de Cartago, 733 F.2d 23 (2d Cir. Apr. 23, 1984) (published in advance sheets only) (copy on file with the *Washington Law Review*), *withdrawn and vacated*, 757 F.2d 516 (2d Cir.), *cert. dismissed*, 106 S. Ct. 30 (1985). The Second Circuit's initial decision caused considerable consternation among members of the international financial community. *See, e.g.*, Financial Times, May 24, 1984, at 36 (quoting a "leading European authority on the law concerning international money obligations" as saying, "From now on no one in his right mind will specify New York law and New York as a place of litigation in a loan agreement."); The Economist, May 5, 1984, at 16 ("Unless and until the United States Supreme Court reverses the Costa Rican ruling, bankers will be even more cautious about their Latin American customers, who will therefore be even more tempted to tear up their loan agreements . . . ."). The Second Circuit's initial decision was withdrawn and is unpublished. *See supra* note 4.

199. In its initial decision, the Second Circuit affirmed the district court, but on different grounds. The court of appeals reasoned:

> Costa Rica's prohibition of payment of its external debts is analogous to the reorganization of a business pursuant to Chapter 11 of our Bankruptcy Code . . . . Costa Rica's prohibition of payment of debt was not a repudiation of the debt but rather was merely a deferral of payments while it attempted in good faith to renegotiate its obligations.

733 F.2d 23, 26 (2d Cir. Apr. 23, 1984) (published in advance sheets only) (copy on file with the *Washington Law Review*), *withdrawn and vacated*, 757 F.2d 516 (2d Cir.), *cert. dismissed*, 106 S. Ct. 30 (1985). The court also emphasized that Costa Rica's restructuring of its debts was consistent with policies expressed by the political and executive branches of the United States. *Id.* at 26–27. Finding the acts by the Costa Rican government to be "consistent with the law and policy of the United States," the Second Circuit upheld the Costa Rican decrees on the basis of comity. *Id.*

The Second Circuit based its conclusion that the Costa Rican decrees were consistent with United States policy on actions taken by the executive with respect to Costa Rican defaults on United States government loans. Under the Foreign Assistance Act of 1961, 22 U.S.C. § 2370(q) (1982), further aid to a defaulting country is barred unless the President advises Congress that "assistance to such country is in the national interest." *Id.* at 25 (quoting 22 U.S.C. § 2370(g) (1982)). The Second Circuit noted that President Reagan had certified to Congress that continued United States assistance to Costa Rica is consistent with the national interest. *See id.* (citing letters from George P. Schultz to Thomas P. O'Neill dated March 18, 1983 and October 11, 1983). The court further noted that in January 1983 the United States

the applicability of the doctrine "depends upon the situs of the property at the time of the purported taking."[200] The property at issue "is Allied's right to receive repayment from the Costa Rican banks."[201] Thus, the act of state doctrine is applicable "only if, when the decrees were promulgated, the situs of the debts was in Costa Rica."[202] The court then held:

> [T]he concept of the situs of a debt for act of state purposes differs from the ordinary concept. It depends in large part on whether the purported taking can be said to have "come to complete fruition within the dominion of the [foreign] government." . . . In this case, Costa Rica could not wholly extinguish the Costa Rican banks' obligation to timely pay United States dollars to Allied in New York. Thus the situs of the debt was not Costa Rica.[203]

The court noted that the same result obtained under "ordinary situs analysis."[204] Since the act of state doctrine was inapplicable, the court was free

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joined several other nations in the signing of the Paris Club Agreement, which rescheduled Costa Rica's debt to other nations, including the United States.

After Allied Bank moved for a rehearing of the Second Circuit's decision, the United States submitted an amicus brief in support of reversal. In its brief, the Justice Department explained that the President's certifications under the Foreign Assistance Act and the Paris Club Agreement dealt with loans by the United States government to Costa Rica and not with commercial loans by private lenders to Costa Rica. Brief for the United States as Amicus Curiae, at 11 n.7, Allied Bank Int'l v. Banco Credito Agricola De Cartago, 757 F.2d. 516 (2d Cir. 1985). The government explained that none of these actions indicates that Costa Rican debt to private creditors should be rendered unenforceable by virtue of actions of the Costa Rican government to which the creditors did not agree. *Id.*

The government explained that with respect to private commercial loans, it supported the voluntary debt resolution procedure already in place under the auspices of the International Monetary Fund (IMF), *id.* at 6, which is a specialized agency of the United Nations established to promote international monetary cooperation and stability. *See infra* note 445. This approach encourages the voluntary restructuring of debt between countries and private lenders within a context that presupposes that the underlying loan contract remains enforceable. *Id.* By holding that such loan agreements are unenforceable, the court risks jeopardizing this entire framework. *Id.* at 18. Given the court's decision, debtor countries may seek to obtain unilateral concessions from lenders rather than negotiate real and lasting solutions to the debt problem. *Id.* at 7. Creditors, on the other hand, would be less likely to continue to extend much needed loans to debtor nations. *Id.* at 15–16. No one in the international financial community stands to benefit if the IMF's voluntary debt resolution procedure is undermined. *Id.* at 16. Thus, Costa Rica's unilateral suspension of payments under a loan agreement with private lenders is *inconsistent* with United States law and policy. *Id.* at 6.

After considering the government's views, the Second Circuit vacated its original opinion. *See* Allied Bank Int'l v. Banco Credito Agricola de Cartago, 757 F.2d 516 (2d Cir.), *cert. dismissed*, 106 S. Ct. 30 (1985).

200. *Allied Bank*, 757 F.2d at 521.

201. *Id.*

202. *Id.*

203. *Id.* For this analysis the court relied on Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co., 392 F.2d 706, 715–16 (5th Cir.), *cert. denied*, 393 U.S. 924 (1968). For the facts of this case, see *infra* note 290. For a critique of this approach, see *infra* notes 292–301 and accompanying text.

204. Without explaining what it meant by "ordinary situs analysis," the Second Circuit stated:

> The Costa Rican banks conceded jurisdiction in New York and they agreed to pay the debt in New York City in United States dollars. Allied, the designated syndicate agent, is located in the United States, specifically in New York; some of the negotiations between the parties took place in the

to judge the validity of the Costa Rican decrees under United States law. This determination, however, was limited by the traditional choice of law rule that foreign acts "should be recognized by the courts only if they are consistent with the law and policy of the United States."[205] Relying on the Justice Department's statement of its position with respect to the Costa Rican decrees, the court held that the decrees were inconsistent with United States policy, refused to recognize them, and held that the loan agreements were enforceable in the United States.[206]

The complete fruition test adopted by the *Allied Bank* court was first set forth by the Fifth Circuit.[207] A few months after the *Allied Bank* decision on rehearing, the Fifth Circuit refused to follow its own complete fruition test in analyzing debt situs. In *Callejo v. Bancomer, S.A.*,[208] plaintiffs placed certificates of deposit with Bancomer, a private Mexican bank.[209] The certificates were denominated in United States dollars and were payable at Bancomer's Mexico office.[210] In response to its debt crisis, the Mexican

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United States. The United States has an interest in maintaining New York's status as one of the foremost commercial centers in the world. Further, New York is the international clearing center for United States dollars. In addition to other international activities, United States banks lend billions of dollars to foreign debtors each year. The United States has an interest in ensuring that creditors entitled to payment in the United States in United States dollars under contracts subject to the jurisdiction of United States courts may assume that, except under the most extraordinary circumstances, their rights will be determined in accordance with recognized principles of contract law.

In contrast, while Costa Rica has a legitimate concern in overseeing the debt situation of state-owned banks and in maintaining a stable economy, its interest in the contracts at issue is essentially limited to the extent to which it can unilaterally alter the payment terms. Costa Rica's potential jurisdiction over the debt is not sufficient to locate the debt there for the purposes of act of state doctrine analysis. . . .

Thus, under either analysis, our result is the same: the situs of the debt was in the United States, not in Costa Rica. Consequently, this was not "a taking of property within its own territory by [Costa Rica].". . . The act of state doctrine is, therefore, inapplicable.

Allied Bank, 757 F.2d at 521–22 (quoting Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964)).

205. *Id.* at 522.

206. *Id.* The international banking community hailed the result reached by the court on rehearing, *see, e.g.*, Cashel, Allied Bank *Case reversed on rehearing*, Int'l Fin. L. Rev., Apr. 1985, at 7–8 (bankers "will be relieved at this outcome"), but expressed concern about the clarity of the court's reasoning. *See* Herzstein, *The view from Washington DC*, Int'l Fin. L. Rev., Aug. 1985, at 30–31 (suggesting that while the result reached in the *Allied Bank* opinion on rehearing should not be of concern, its reasoning needs to be rethought to provide predictability to international business transactions); Lindskog, Allied Bank: *The reasoning behind the recent decision*, Int'l Fin. L. Rev., May 1985, at 24 (opinion on rehearing "does not give a satisfactory analysis or explanation").

207. Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co., 392 F.2d 706 (5th Cir.), *cert. denied*, 393 U.S. 924 (1968); *see infra* note 290; *see also* Maltina Corp. v. Cawy Bottling Co., 462 F.2d 1021, 1026–27 (5th Cir.), *cert. denied*, 409 U.S. 1060 (1972) (applying and elaborating on rationale of complete fruition test).

208. 764 F.2d 1101 (5th Cir. 1985).

209. *Id.* at 1105.

210. *Id.* at 1106.

government nationalized Bancomer and imposed exchange control regulations,[211] which required all deposits in Mexican banks, however denominated, to be paid in pesos at a rate of exchange that was well below market rate.[212] Alleging heavy financial losses due to the exchange control regulations, plaintiffs brought suit against the Mexican bank for breach of contract.[213] The Mexican bank asserted the act of state doctrine as a defense.[214]

Rejecting the complete fruition test, the Fifth Circuit ruled that "the proper test for determining situs is where the incidents of the debt, as a whole, place it."[215] According to the court, the ultimate inquiry is whether "the ties of the debt to the foreign country [are] sufficiently close that we will antagonize the foreign government by not recognizing its acts."[216] Examining the place where the deposit was carried, the place of payment, and the intent of the parties regarding the governing law, the court held that the incidents of the debt placed it in Mexico and upheld the defendant's act of state defense.[217]

The application of the doctrine to sovereign acts affecting intangible property has added yet another area of controversy and uncertainty to act of state jurisprudence. Courts and commentators agree that traditional act of state analysis, which focuses on the situs of property, cannot offer guidance in cases involving intangible property, which has an indefinite situs. They cannot agree, however, on the proper approach to sovereign acts affecting intangible property, and seek to apply fresh sets of specialized rules to these novel disputes. Consequently, current act of state jurisprudence is more crowded than ever with competing, inconsistent theories.

II. CRITIQUE OF THEORIES OF THE ACT OF STATE DOCTRINE

As discussed in Part I, shifts in the legal and jurisprudential foundations of the act of state doctrine gave rise to the development of different theories of the act of state doctrine. This article now examines the major theories that comprise act of state jurisprudence and contends that no one of these theories can justify the doctrine adequately. Moreover, the theories, taken together, are inconsistent with each other.

211. *Id.*
212. *Id.*
213. *Id.*
214. *Id.* at 1114.
215. *Id.* at 1123.
216. *Id.* at 1124.
217. *Id.*

A. *Choice of Law Theory*

According to the choice of law theory, "[t]he act-of-state doctrine is, in its origins and essence, a federal rule mandating a choice of law by which to judge the validity of the official actions of sovereign states."[218] Under traditional choice of law[219] analysis, in any case that may involve the application of foreign law, a court must first decide whether it has jurisdiction to adjudicate the dispute.[220] If the court determines that it is competent to adjudicate, it must then determine what law governs the case.[221] This determination is made according to the choice of law rules of the forum state.[222] If foreign law is chosen under these choice of law rules, the court will apply the foreign law to decide the case. Under traditional choice of law analysis, however, the court may nevertheless refuse to apply foreign law if it is contrary to the public policy of the forum.[223] Only at this point does the act of state doctrine become operative. "The act of state doctrine precludes giving effect to [the] public policy [of the forum] to deny effect to the foreign law."[224]

As explained in Part I, choice of law theory accounts for the results reached in *Oetjen*,[225] *Ricaud*,[226] and *Sabbatino*.[227] Those cases involved the question of title to chattel property and under accepted choice of law

218. Sharon v. Time, Inc., 599 F. Supp. 538, 546 (S.D.N.Y. 1984). Professor Louis Henkin is one of the chief proponents of this view. *See* Henkin, *Recollections in Tranquility*, *supra* note 3, at 178; *see also* Leigh & Sandler, *supra* note 87, at 709–16. Justice White has also advocated this view. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 446 (1964) (White, J., dissenting).

219. Choice of law is the body of jurisprudence that recognizes that "[t]he world is composed of territorial states having separate and differing systems of law. Events and transactions occur, and issues arise, that may have a significant relationship to more than one state, making necessary a special body of rules and methods for their ordering and resolution." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 1 (1971).

220. Jurisdiction to adjudicate refers to a state's power "to subject persons or things to the process of its courts or administrative tribunals, whether in civil or in criminal proceedings, and whether or not the state is a party to the proceedings." RESTATEMENT FOREIGN RELATIONS (Tent. Draft No. 6), *supra* note 15, § 401.

221. RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 6 (1971).

222. *Id.*

223. *Id.* § 90.

224. RESTATEMENT FOREIGN RELATIONS (Tent. Draft No. 7), *supra* note 17, § 469, reporters' notes 1.

225. 246 U.S. 297 (1918); *see supra* text accompanying notes 70–75.

226. 246 U.S. 304 (1918); *see supra* text accompanying notes 70–75.

227. 376 U.S. 398 (1964); *see supra* text accompanying notes 99–119. Underhill v. Hernandez, 168 U.S. 250 (1897), can also be explained by this theory. In that case, the issue was whether General Hernandez's detainment of Underhill gave rise to tort liability. Under the then prevailing conflict of laws analysis the tortious nature of conduct was determined by the law of the place where the conduct occurred. *See* RESTATEMENT (FIRST) OF CONFLICTS OF LAWS §§ 377, 378 (1934). Thus, the law of Argentina governed the issue of Hernandez's liability to Underhill. Hernandez was not liable to Underhill under Argentinean law and the act of state doctrine mandates that no public policy of the forum can be used to deny effect to Argentinean law.

rules, matters of title are governed by the law of the situs of the property.[228] Thus, under choice of law analysis, title to the chattels was governed by the law of Mexico in *Oetjen* and *Ricaud* and by the law of Cuba in *Sabbatino*. In these cases, title to the chattels had been effectively transferred to the expropriating government and the act of state doctrine mandated that no public policy of the forum could be used to deny effect to the foreign act.[229]

Under the choice of law theory of the act of state doctrine, the doctrine adds little or nothing to ordinary choice of law analysis.[230] Indeed, the act of state doctrine operates only under very narrow circumstances. First, a court must choose foreign law according to the choice of law rules of the forum state.[231] Second, the application of the foreign law must contravene some strong public policy of the forum, e.g., a policy against expropriation without compensation. Only at this point does the act of state doctrine apply; the doctrine then operates to bar the forum court's use of local public policy to deny giving effect to the foreign act.[232]

The problems associated with this theory arise from the consequences of *Erie Railroad v. Tompkins*.[233] Act of state cases brought in federal court are usually predicated on diversity jurisdiction,[234] or the Foreign Sovereign Immunities Act,[235] or both. Based on either or both of these jurisdictional predicates, federal courts must apply as their rules of decision the law of the forum state, including the state's choice of law rules.[236]

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228. *See infra* note 238; *see also infra* note 237.

229. Justice White suggests as a rationale for this theory that deference to such foreign acts maintains a certain stability in transnational transactions, avoids friction between nations, and encourages settlement of disputes through diplomatic means. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 447 (1964) (White, J., dissenting).

230. One commentator has suggested that ordinary conflict of laws analysis—without any appeal to the act of state doctrine at all—would be sufficient to resolve cases with transnational elements. *See* Zander, *supra* note 3, at 826; *see also* Leigh & Sandler, *supra* note 87, at 716 ("[T]he act of state doctrine would be more comprehensible and manageable if it were restored to its conflict of laws foundation.").

231. *See, e.g.*, Johansen v. Confederation Life Ass'n, 447 F.2d 175, 184 (2d Cir. 1971) (Feinberg, J., dissenting) ("[T]he act of state [doctrine] has no relevancy unless the New York courts would apply Cuban law.").

232. *See* Henkin, *Foreign Affairs*, *supra* note 3, at 813 n.27 ("It is only when a state is tempted, because of a local policy, to deny effect to a foreign law applicable under its rules of conflict of laws that considerations of the foreign policy of the United States enter to require the state to give effect to the act of the foreign state.").

233. 304 U.S. 64 (1938); *see also supra* note 90.

234. 28 U.S.C. § 1332 (1982).

235. 28 U.S.C. §§ 1330, 1332(a)(2)–(4), 1391(f), 1441(d), 1602–1611 (1982).

236. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941). State law governs even if federal jurisdiction is based on the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§ 1330, 1332(a)(2)–(4), 1391(f), 1441(d), 1602–1611 (1982). Congress has provided that, except for the sovereign immunity issue itself (and certain related issues), state law shall govern all cases brought under the FSIA. *Id.* § 1606; *see* First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba, 462 U.S. 611, 621 & n.11 (1983); Verlinden, B.V. v. Central Bank of Nigeria, 461 U.S. 480, 491 (1983).

So long as act of state cases involved completed or attempted confiscations of tangible property, there was no real likelihood that courts of different states would reach different results in applying local choice of law rules. The choice of law rule that the law of the situs governs issues of title to the res is a universal rule accepted in the United States[237] and abroad.[238] Thus, universal acceptance of the *lex situs* rule promised uniform results.

Since *Sabbatino,* however, the act of state doctrine has been involved increasingly in a variety of contexts and the application of the forum state's choice of law rules could lead to diverse results. For example, in both *Pan-American Life Insurance Co. v. Blanco*[239] and *Johansen v. Confederation Life Association,*[240] federal courts had to decide whether the act of state doctrine was implicated in determining the effect to be given Cuban currency regulations that purported to alter rights under insurance contracts issued by insurance companies doing business in Cuba.[241] The contracts were issued to Cuban residents who subsequently fled to the United States to avoid the consequences of the Cuban revolution.[242] Both courts first recognized that in diversity cases, a federal court must apply the choice of law rules of the state in which it sits.[243] In *Pan-American Life,* the Fifth Circuit applied Louisiana choice of law rules, which, at the time, specified that the law of the place of performance governed matters of performance under the contract.[244] Find-

237. *See, e.g.,* United States v. Crosby, 11 U.S. (7 Cranch) 115, 116 (1812) (Story, J.) ("The court entertain no doubt. . . . that the title to land can be acquired and lost only in the manner prescribed by the law of the place where such land is situate."); RESTATEMENT (SECOND) CONFLICT OF LAWS §§ 223, 226 (1971); *see also* RESTATEMENT (FIRST) CONFLICT OF LAWS §§ 214–254 (1934). *See generally* R. LEFLAR, AMERICAN CONFLICTS LAW (3d ed. 1977):

> The original creation of a first title in previously unowned land, the validity and effect of subsequent transfers whether voluntary or involuntary, the creation of incumbrances upon or subsidiary interests in the land, the legal effect upon the title of such events as marriage, death, infancy, or insanity of an owner, and the measure of control over the land inherent in any form of ownership, all have traditionally been said to depend upon the land law of the place where the land lies.

Id. at 341.

238. A leading commentator observes:

> It is at present the universal principle, manifested in abundant decisions and recognized by all writers, that the creation, modification, and termination of rights in individual tangible physical things are determined by the law of the place where the thing is physically situated.

4 E. RABEL, THE CONFLICT OF LAWS: A COMPARATIVE STUDY 30 (1958) (footnote omitted); *see, e.g.,* A. EHRENSWEIG, A TREATISE ON CONFLICT OF LAWS 607–33 (1962); 2 J.H.C. MORRIS, L. COLLINS, J. MCCLEAN & M. MANN, DICEY & MORRIS ON THE CONFLICT OF LAWS 548 (10th ed. 1980); E. RE, FOREIGN CONFISCATIONS IN ANGLO-AMERICAN LAW—A STUDY OF THE "RULE OF DECISION" PRINCIPLE 159 (1951); Baade, *Indonesian Nationalization Measures Before Foreign Courts—A Reply,* 54 AM. J. INT'L L. 801, 801 (1960).

239. 362 F.2d 167 (5th Cir. 1966).

240. 447 F.2d 175 (2d Cir. 1971).

241. *Johansen,* 447 F.2d at 180; *Pan-American Life,* 362 F.2d at 168–70.

242. *Johansen,* 447 F.2d at 177–78; *Pan-American Life,* 362 F.2d at 168–70.

243. *Pan-American Life,* 362 F.2d at 170; *Johansen,* 447 F.2d at 178.

244. *See, e.g.,* Mansfield Hardwood Lumber Co. v. Johnson, 268 F.2d 317, 319 n.5 (5th Cir. 1959)

ing the place of performance to be the United States since the contracts were payable there, the Fifth Circuit held that the Cuban currency laws did not apply to the insurance contracts.[245] In *Johansen,* the Second Circuit applied New York choice of law rules, which advocate a "grouping of contacts" approach[246] or an "interest-based approach."[247] As a result, the Second Circuit found that the insurance contracts were governed by Cuban law.[248]

In *Pan-American Life* and *Johansen,* both federal courts faced the issue of the effect to be given the currency decree of a foreign sovereign. In a matter that seems to implicate United States foreign policy and international law, the federal courts applied discrete bodies of state law to decide the case.[249] Moreover, if the state law had been unclear, the federal courts might have guessed—subject to being mistaken and overruled by the state courts.[250]

The problem, then, with the choice of law theory is that the federal act of state doctrine becomes applicable only after a court has decided, under state choice of law rules, that the foreign law applies.[251] Since each state

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(applying Louisiana law); Bologna Bros. v. Morrissey, 154 So. 2d 455, 459 (La. Ct. App.), *cert. denied,* 245 La. 56, 156 So. 2d 601 (1963). Article 10 of the Louisiana Civil Code, in effect at the time that *Pan-American Life* was decided, provides in pertinent part:

> The form and effect of public and private written instruments are governed by the laws and usages of the places where they are passed or executed. But the effects of acts passed in one country to have effect in another country, are regulated by the laws of the country where such acts are to have effect
>
> . . . .

LA. CIV. CODE ANN. art. 10 (West Supp. 1986); *see also* Comment, *Conflict of Laws in Louisiana: Contract,* 38 TUL. L. REV. 726, 729 (1964) ("As embodied in article 10 of the Louisiana Civil Code, the rule *lex loci solutionis* is unquestionably the proper principle to be applied by the Louisiana courts.").

245. *Pan-American Life,* 362 F.2d at 170–71; *see also supra* note 244.

246. *Johansen,* 447 F.2d at 178 (citing Auten v. Auten, 308 N.Y. 155, 160, 124 N.E.2d 99, 101 (1954)).

247. *Id.* (citing Miller v. Miller, 22 N.Y.2d 12, 15–16, 237 N.E.2d 877, 880, 290 N.Y.S.2d 734, 737 (1968)).

248. *Id.* at 179–80.

249. A more recent example of a federal court applying state choice of law rules to determine the effect of foreign currency decrees is Irving Trust Co. v. Mamidakis, No. 78-0265 (S.D.N.Y. Oct. 18, 1978), where the court ruled that under New York law, currency regulations issued by the Greek government did not apply to loan agreements payable in New York.

250. *See supra* note 94.

251. The proponent of the choice of law theory of the act of state doctrine may argue that one way to meet this objection is to make an exception to *Erie* and apply a federal common law choice of law doctrine when the choice of law question involves the law of a foreign sovereign. *Cf.* Jessup, *The Doctrine of* Erie Railroad v. Tompkins *Applied to International Law,* 33 AM. J. INT'L L. 740, 743 (1939) ("whatever the specific grounds for disposing of an individual case, any attempt to extend the doctrine of the Tompkins case to international law should be repudiated").

In Erie Railroad v. Tompkins, 304 U.S. 64 (1938), Justice Brandeis wrote: "Except in matters governed by the Federal Constitution or by Act of Congress, the law to be applied in any case is the law of the State . . . . There is no federal general common law." *Id.* at 78. It is now generally recognized that this statement is not entirely true and that federal courts can fashion "specialized" federal common law, substantive rules of law not expressly authorized by either the Constitution or any act of Congress, that preempt state law. *See* Friendly, *In Praise of* Erie—*And of the New Federal Common Law,* 39 N.Y.U. L.

has its own choice of law jurisprudence, the critical issue of governing law could be decided as they wish by the fifty states. As Judge Friendly stated:

> It is fundamental to our constitutional scheme that in dealing with other nations the country must speak with a united voice. . . . It would be baffling if a foreign act of state . . . were ignored on one side of the Hudson but respected on the other; any such diversity between states would needlessly complicate the handling of the foreign relations of the United States. The required uniformity can be secured only by recognizing . . . that all questions relating to an act of state are questions of federal law, to be determined ultimately, if need be, by the Supreme Court of the United States.[252]

When choice of law determinations involve the effect to be given foreign sovereign acts, they implicate the foreign relations of the United States and, in the words of Professor Henkin, matters concerning "the nation's foreign relations are 'intrinsically federal.'"[253]

B. Theory of Judicial Deference to the Executive's Role in the Conduct of Foreign Affairs

According to the theory of judicial deference to the executive, "the act of state doctrine justifies its existence primarily on the basis that juridical review of acts of state of a foreign power could embarrass the conduct of foreign relations by the political branches of the government."[254] The

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REV. 383, 405 (1964); *see also* C. WRIGHT, LAW OF FEDERAL COURTS § 60, at 388 (1983). One area where federal common law, not state law, should govern are cases involving a strong national or federal concern, such as foreign relations. *See* 19 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4514, at 224–25 (1982); Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1559–61 (1982). Thus, it is possible to argue that the *Erie* doctrine should not be applied to choice of law questions involving the law of a foreign sovereign and that this issue should be governed by a federal common law choice of law doctrine.

The new conception of the act of state doctrine suggested by this article—that the act of state doctrine should be analyzed in terms of jurisdiction to prescribe—is, in essence, a federal choice of law approach to act of state cases. *See infra* text accompanying notes 337–42, 371–73. Whether an approach based on the doctrine of jurisdiction to prescribe is preferable to or really differs from an approach based on the development of a federal common law choice of law analysis is a topic that is beyond the scope of this article.

252. Republic of Iraq v. First Nat'l City Bank, 353 F.2d 47, 50–51 (2d Cir. 1965), *cert. denied*, 382 U.S. 1027 (1966).

253. Henkin, *Foreign Affairs*, *supra* note 3, at 815. Professor Henkin elaborates:

> When a law of a foreign country is concerned, the choice of law rules hardly are a matter of primarily local policy and concern; they impinge on national interests and the foreign relations of the United States. International conflicts, then, may raise federal questions on which states do not call the tune but must follow the federal lead.

Id. at 820 n.51.

254. First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 765 (1971) (plurality opinion of Rehnquist, J.).

predicate of this theory is that the executive branch has "exclusive competence . . . in the field of foreign affairs."[255]

Under the separation of powers doctrine, the judiciary must operate independently and free of influence and direction from the executive or legislative branches.[256] The judicial deference theory of the act of state doctrine may lead to violations of the separation of powers doctrine because the judiciary becomes unduly influenced by the executive in act of state cases.

Under the judicial deference theory, courts should abstain from deciding cases involving acts of a foreign sovereign because a judicial decision at odds with executive foreign policy could embarass the executive in its conduct of foreign affairs.[257] If the court is uncertain whether a decision would be inconsistent with United States foreign policy, then the court should abstain to avoid risking embarassment to the executive.[258] On the other hand, where the executive has stated that a judicial decision will not interfere with foreign policy, then, under the judicial deference theory, courts should decide the case since the reason for abstention, i.e., possible embarassment to the executive, has been removed.[259] If courts obediently followed executive positions on whether judicial power should be exercised in act of state cases, then the executive becomes the decisionmaker and, in effect, usurps the judicial power from the courts. The judiciary is reduced to a "mere errand boy for the Executive Branch which may choose to pick some people's chestnuts from the fire and not others."[260]

Even if judicial compliance does not always rise to the level of a constitutional violation, heavy reliance on the views of the executive tarnishes the image of the judiciary as an independent branch of government. For example, in the Second Circuit's first *Allied Bank* decision, the Costa Rican defendants submitted evidence of continuing United States governmental aid to Costa Rica despite its defaults on loans from the United States government.[261] Taking this to be an indication of executive approval of Costa Rica's suspension of all debt, the Second Circuit recognized the Costa Rican currency decrees as legal justification for the Costa Rican

255. *Id.* at 766 (footnote omitted) (citing United States v. Belmont, 301 U.S. 324 (1937)).

256. *See* Buckley v. Valeo, 424 U.S. 1, 120 (1975) (per curiam); *see generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 2-2 to 2-4 (1978).

257. *See Citibank*, 406 U.S. at 765–67.

258. *See, e.g.*, Allied Bank Int'l v. Banco Credito Agricola de Cartago, 566 F. Supp. 1440, 1444 (S.D.N.Y. 1983), *aff'd*, 733 F.2d 23 (2d Cir. 1984) (published in advance sheets only), *withdrawn and vacated*, 757 F.2d 516 (2d Cir.), *cert. dismissed*, 106 S. Ct. 30 (1985).

259. *See* First Nat'l Bank v. Banco Nacional de Cuba, 406 U.S. 759, 768 (1972) (plurality opinion of Rehnquist, J.).

260. First Nat'l Bank v. Banco Nacional de Cuba, 406 U.S. 759, 773 (1972) (Douglas, J., concurring in the result).

261. *See supra* note 199.

banks' failure to repay private debt.[262] On rehearing, the Justice Department contended that the Costa Rican *private* debt moratorium was inconsistent with United States policy. The court then reversed its position on the decrees, stating that "[i]n light of the government's elucidation of its position, we believe that our earlier interpretation of United States policy was wrong."[263] Apparently, the Justice Department's views played a critical, if not dispositive, role in the Second Circuit's decisions. Such an abrupt turnaround by the court blemishes its reputation as an independent and impartial branch of government.

Judicial reliance on executive positions with respect to issues having foreign policy implications politicizes judicial decisionmaking. The executive branch is motivated by political objectives that change as various political administrations in the United States come into power. As a result, executive pronouncements on the act of state doctrine have been inconsistent, impeding judicial development of the doctrine.[264]

Finally, the injection of the demands of political expediency into judicial decisionmaking undermines one of the classic justifications of judicial review in a democratic society—that the judicial branch, because of its insulation from the practical needs and pressures of the "moment's hue and cry,"[265] has the unique institutional capacity to provide the "sober second thought"[266] that helps shape and protect our society's enduring values.[267]

C. *Theory of Nonjusticiability Based on the Political Question Doctrine*

According to Justice Brennan, "*Sabbatino* held that the validity of a foreign act of state in certain circumstances is a 'political question' not cognizable in our courts."[268] However, while the *Sabbatino* Court may have perceived some similarity between the act of state doctrine and the political question doctrine, the Court did not equate the two doctrines. As Professor McDougal states:

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262. *See id.*

263. Allied Bank Int'l v. Banco Credito Agricola de Cartago, 757 F.2d at 519–20.

264. *See* Bazyler, *supra* note 3, at 362–65. Indeed, Professor Bazyler states that:

> As a result of its inconsistent pronouncements, the Executive has been a major culprit in creating judicial confusion about the act of state doctrine. Without the Executive's involvement, the judiciary might by now have formulated a workable and consistent doctrine for international transaction cases.

Id. at 365.

265. A. BICKEL, THE LEAST DANGEROUS BRANCH 26 (1962).

266. *Id.* (quoting Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 25 (1936)).

267. A. BICKEL, *supra* note 265, at 25.

268. First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 787–88 (1972) (Brennan, J., dissenting); *see also* International Ass'n of Machinists & Aerospace Workers v. OPEC, 649 F.2d 1354, 1358 (9th Cir. 1981) ("The act of state doctrine is similar to the political question doctrine in domestic law."), *cert. denied*, 454 U.S. 1163 (1982).

> The policies applied by the [*Sabbatino*] Court, relating to the appropriate allocation of competences among the different branches of our Government, are, in fact, those which underlie the "political questions" doctrine, but the Court did not apply the tests for "political questions" which it had so recently announced in *Baker v. Carr* . . . , and it did not find the issue nonjusticiable, as application of the "political questions" doctrine would have required.
>
> The doctrine of automatic, blanket abstention announced by the Court is clearly a new, and bizarre creation.[269]

Moreover, Justice Brennan did not explain why, if the act of state and political question doctrines were equivalent, act of state issues cannot simply be subsumed under the political question analysis.[270] In other words, Justice Brennan did not explain the need for a separate act of state doctrine at all.

Lower courts have relied on the political question theory as the basis for an expanded version of the act of state doctrine that requires judicial abstention.[271] The danger of this approach is that even when traditional act of state rules do not bar judicial inquiry, courts rely on vague and undefined notions of nonjusticiability as a vehicle for judicial abstention.[272] It is one thing for courts to apply the true political question analysis of *Baker v. Carr;*[273] it is another for courts to invoke a general notion of nonjusticiability to avoid deciding a case simply because it involves an international transaction and difficult issues. This broadened theory of the act of state doctrine leads courts to neglect their duty to adjudicate and denies litigants access to the courts.[274]

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269. *The Foreign Assistance Act of 1965: Hearings on H. 7750 Before the House Comm. on Foreign Affairs*, 89th Cong., 1st Sess. 1037 (1965).

270. *See* Bazyler, *supra* note 3, at 390.

271. *See supra* note 176.

272. An example of this trend is Buttes Gas & Oil Co. v. Hammer, 3 W.L.R. 787 (1981). Finding that traditional act of state analysis did not bar judicial review, Lord Wilberforce asked whether "there exists in English law a more general principle that the courts will not adjudicate upon the transactions of foreign sovereign states." *Id.* at 804. He found that such a principle existed. This principle, however, is not a particular version of the act of state doctrine, but a general "principle, in suitable cases, of judicial restraint or abstentions." *Id.* at 804, 806.

273. 369 U.S. 186 (1962).

274. In Sharon v. Time, Inc., 599 F. Supp. 538 (S.D.N.Y. 1984), the court stated:

> Our national policy reflects, if anything, a reexamination of *Sabbatino,* rather than a political consensus for its transformation into a jurisdictional bar through its amalgamation with the analogous but similarly questionable device of judicial abstention. Absent some guidance to the contrary from the political branches, the present circumstances do not justify a refusal to perform the duty to adjudicate.

Id. at 553.

D. Theories Underlying the Intangible Property Cases

The intangible property cases, which involve sovereign acts affecting debt obligations, rely on three different theories to analyze debt situs. First, courts use the debt situs analysis of *Harris v. Balk*,[275] which focuses on personal jurisdiction over the debtor. Other courts adopt the complete fruition test,[276] which focuses on the foreign sovereign's physical power over the property. Finally, the emerging incidents of the debt[277] theory considers whether judicial inquiry will frustrate the foreign sovereign's reasonable expectations of dominion over the debt.

1. The Harris v. Balk *Analysis*

In *Harris,* the Supreme Court stated that "[t]he obligation of the debtor to pay his debt clings to and accompanies him wherever he goes."[278] In *Menendez v. Saks & Co.*,[279] the lower court *Dunhill* opinion,[280] the Second Circuit applied the *Harris* test in an act of state case involving conflicting claims to debts owed by an American cigar importer.[281] The Second Circuit found the United States to be the situs of the importer's obligation to pay the former owners of the cigar companies for a portion of the debts.[282] The court stated that "[f]or the purposes of the act of state doctrine, a debt is not 'located' within a foreign state unless that state has the power to enforce or collect it. . . . [T]he power to enforce payment of a debt . . . generally depends on jurisdiction over the person of the debtor."[283]

275. 198 U.S. 215 (1904); *see supra* text accompanying notes 187–91.

276. *See supra* text accompanying notes 200–03.

277. *See* Callejo v. Bancomer, S.A., 764 F.2d 1101, 1123 (5th Cir. 1985); Libra Bank, Ltd. v. Banco Nacional de Costa Rica, 570 F. Supp. 870, 881 (S.D.N.Y. 1983). For an argument in favor of this view, see Note, *Resolving Debt Situs, supra* note 6. *See also* Hoffman & Deming, *supra* note 6 (courts should enforce expectations of all parties to a financial transaction).

278. 198 U.S. at 222.

279. 485 F.2d 1355 (2d Cir. 1973), *rev'd sub. nom.* Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976). The Supreme Court, however, did not disturb the Second Circuit's debt situs analysis.

280. *See supra* text accompanying notes 141–52.

281. *Menendez*, 485 F.2d at 1360–61.

282. *Id.* at 1364.

283. *Id.* at 1364, 1365 (citing Harris v. Balk, 198 U.S. 215 (1904)).

As a practical matter, the rigid *Harris* formula presents problems.[284] Since the *Harris* test relies on the single factor of personal jurisdiction to situate the debt, a debt can have multiple situses because more than one state or nation can have personal jurisdiction over the debtor. The possibility of multiple situses of debts did not cause problems in the first act of state cases applying the *Harris* test because in those cases the foreign government was attempting to collect debts, typically in the form of accounts receivable, from American debtors.[285] Since the foreign nation did not have personal jurisdiction over the American debtors, the debts were not located in the foreign nation. On the other hand, in the loan default cases such as *Allied Bank,*[286] the foreign sovereign is the debtor and is attempting to avoid payment of the debt to American creditors. A mechanical application of the *Menendez/Harris* rules will always locate the debt in the foreign nation since the foreign nation, in theory, always has the power to enforce the collection of the debt from one of its citizens or instrumentalities.[287] The *Menendez/Harris* test thus broke down in the loan default cases, causing the courts to engage in an uncertain search for a new approach.[288]

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284. The revised Restatement of Foreign Relations has criticized this mechanical approach:

> In principle, it might be preferable to approach the question of the applicability of the act of state doctrine to intangible assets not by searching for an imaginary situs for property that has no real situs, but by determining how the act of the foreign state in the particular circumstances fits within the reasons for the act of state doctrine and for the territorial limitation . . . .

RESTATEMENT FOREIGN RELATIONS (Tent. Draft No. 7), *supra* note 17, § 469, reporters' notes 4; *see also* Lowenfeld, *In Search of the Intangible: A Comment on* Shaffer v. Heitner, 53 N.Y.U. L. REV. 102, 123 (1978) (mechanical situs rules do not take into account "the competing values—deference to foreign states, uncertainty about governing legal principles, and protection of property rights").

285. *See, e.g.*, United Bank Ltd. v. Cosmic Int'l, Inc., 542 F.2d 868 (2d Cir. 1976); Menendez v. Faber, Coe & Gregg, Inc., 345 F. Supp. 527 (S.D.N.Y. 1972), *aff'd in part and rev'd in part*, Menendez v. Saks & Co., 485 F.2d 1355 (2d Cir. 1973), *rev'd sub. nom.* Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976).

286. *See supra* text accompanying notes 192–217.

287. *See* Callejo v. Bancomer, 764 F.2d 1101, 1123 (5th Cir. 1985); Libra Bank, Ltd. v. Banco Nacional de Costa Rica, 570 F. Supp 870, 881 (S.D.N.Y. 1983); Note, *Resolving Debt Situs, supra* note 6, at 600–01. The *Harris* test could also lead to a priority of confiscation problem in the bank deposit cases. Application of the *Harris* rule will "expose deposits made in an American bank, payable in United States currency at any of its branches worldwide, to confiscation by any country in which the bank maintains a branch office." Perez v. Chase Manhattan Bank, N.A., 61 N.Y.2d 460, 478, 463 N.E.2d 5, 13, 474 N.Y.S.2d 689, 697 (1984) (Wachtler, J., dissenting). Although a debt may have multiple situses, it is but a single obligation and once it is collected, it is extinguished. *See* Garcia v. Chase Manhattan Bank, N.A., 735 F.2d 645, 652 (2d Cir. 1984). Thus, the sovereign that first acts to confiscate, extinguishes the debt. *See* Comment, *Debt Situs, supra* note 6, at 668.

288. For a further critique of the *Harris* test, see *infra* text accompanying notes 428–30.

2. *The Complete Fruition Test*

The complete fruition test places the debt within the territory of the foreign sovereign if "the purported taking can be said to have 'come to complete fruition within the dominion of the [foreign] government.'"[289] This analysis was established by the Fifth Circuit in *Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co.*:[290]

> [W]hen a foreign government performs an act which is an accomplished fact, that is when it has the parties and the *res* before it and acts in such a manner as to change the relationship of the parties touching the *res*, it would be an affront to such foreign government for courts of the United States to hold that such an act was a nullity. Furthermore, it is plain that the decisions took into consideration the realization that in most cases there was nothing the United States courts could do about it in any event.[291]

This view of the act of state doctrine is hailed as "a common-sense one"[292] because it recognizes that when the taking has already been completed, United States courts are powerless to alter the result.[293] The complete fruition test has also been called the "power theory"[294] because it emphasizes the physical power of the foreign sovereign to achieve the confiscation and the inability of United States courts to undo what already has been done.

One flaw with this view is that it is often not true that United States courts are powerless to undo the foreign act of confiscation. In fact, the legal dispute is often triggered by the entry of the disputed property into the United States where the original owner or a successor in interest seeks its return.[295] In addition, many foreign nations now have assets in the United States that are exposed to judicial execution and that can be used to offset losses sustained by victims of confiscation.[296]

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289. Allied Bank Int'l v. Banco Credito Agricola de Cartago, 757 F.2d 516, 521 (2d Cir.) (quoting Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co., 392 F.2d 706, 715–16 (5th Cir.), *cert. denied*, 393 U.S. 924 (1968)), *cert. dismissed*, 106 S. Ct. 30 (1985).

290. 392 F.2d 706 (5th Cir.), *cert. denied*, 393 U.S. 924 (1968). *Tabacalera* involved claims by the plaintiff sole stockholder of a Cuban corporation for the purchase price of tobacco sold to the defendant American corporation. 392 F.2d at 707. A few months after the sale, Cuba "intervened" plaintiff's business. *Id.* The Fifth Circuit upheld plaintiff's claim on the ground that because Cuba did not have control over the property in question, the act of state doctrine did not apply. *Id.* at 714–16.

291. 392 F.2d at 715.

292. *Id.*; *see also* Allied Bank Int'l v. Banco Credito Agricola de Cartago, 757 F.2d 516, 521 (2d Cir.) (act of state analysis "must always be tempered by common sense"), *cert. dismissed*, 106 S. Ct. 30 (1985).

293. *See Tabacalera*, 392 F.2d at 715.

294. *See* Note, *Rehabilitation and Exoneration*, *supra* note 3, at 628.

295. *See, e.g.*, Oetjen v. Central Leather Co., 246 U.S. 297, 301 (1918); Ricaud v. American Metal Co., 246 U.S. 304, 306 (1918).

296. For example, in Libra Bank, Ltd. v. Banco Nacional de Costa Rica, 570 F. Supp. 870 (S.D.N.Y. 1983), Costa Rica, which had defaulted on commercial loan contracts with American banks, had considerable assets in the United States at the time of the default, including $800,000 in various New York City bank accounts. *See id.* at 882.

The basic flaw with the power theory, however, is that "[t]o relate law to physical power over persons and property within territorial limits is . . . to employ a misleading point of departure."[297] It is a truism that the ultimate effectiveness of law depends upon power to coerce compliance, so the relationship of law to physical power cannot be ignored.[298] The power theory, however, elevates the element of physical power to the sole criterion for determining when acts by foreign sovereigns must be respected. But the possession alone of physical power says nothing about whether the exercise of that power is proper or wise or whether respecting such power promotes or defeats the goals of the international legal order.[299] Moreover, there is something deeply disturbing about a legal doctrine that legalizes the use of naked power and promotes to a sovereign prerogative the expropriating nation's expectation that its use of force will be respected everywhere. We seem to believe that there is a distinction between law and naked power and that what legitimates sovereign authority is more than just the power to enforce the sovereign's will.[300] The power theory of the act of state doctrine fails entirely to take these attitudes into account but simply legalizes the primitive "attitude that a nation will take what it can, when it can."[301]

3. *The Incidents of the Debt Analysis*

The virtue of the incidents of the debt analysis is that it explicitly rejects a mechanical approach that focuses on a single determinative factor such as personal jurisdiction. Rather, in such cases the act of state doctrine bars courts from invalidating a foreign act only when to do so would frustrate the foreign sovereign's "reasonable expectations of dominion" over the property in question.[302] The incidents of the debt analysis examines a variety of

297. M. KAPLAN & N. KATZENBACH, THE POLITICAL FOUNDATIONS OF INTERNATIONAL LAW 175 (1961).

298. *See id.*

299. *See id.; see also id.* at 180 ("Where a sovereign possesses the means to enforce its [law], its jurisdiction is unlikely to be questioned elsewhere. But the fact of physical power does not legitimize the exercise of such power . . . .").

300. In discussing Austin's view that power is the ultimate source of law, *see supra* text accompanying notes 58–60, Professor Dworkin writes:

> We make an important distinction between law and even the general orders of a gangster. We feel that the law's strictures—and its sanctions—are different in that they are obligatory in a way that the outlaw's commands are not. . . . Perhaps the distinction we make is illusory—perhaps our feelings of some special authority attaching to the law is based on religious hangover or another sort of mass deception. But Austin does not demonstrate this, and we are entitled to insist that an analysis of our concept of law either acknowledge or explain our attitudes, or show why they are mistaken.

R. DWORKIN, TAKING RIGHTS SERIOUSLY 19 (1978); *see also* H.L.A. HART, THE CONCEPT OF LAW 79–88 (1961) (criticizing Austin's theory as viewing sovereign as a "gunman writ large").

301. Henkin, *Recollections in Tranquility, supra* note 3, at 189.

302. Libra Bank, Ltd. v. Banco Nacional de Costa Rica, S.A., 570 F. Supp. 870, 884 (S.D.N.Y. 1983) is the first case to advocate an incidents of the debt analysis.

factors in order to determine whether "the ties of the debt to the foreign country [are] sufficiently close that [United States courts] will antagonize the foreign government by not recognizing its acts."[303] Factors to be weighed in this analysis include jurisdiction over the debtor, the place of payment, intent as to governing law, and currency denomination.[304]

Insofar as courts are attempting to determine the circumstances under which an act of a foreign sovereign should be recognized as binding on United States courts, the incidents of the debt approach serves the same fundamental function as a choice of law approach.[305] However, the incidents of the debt analysis focuses exclusively on the expectations of the foreign nation and ignores other legitimate interests that are weighed in a choice of law approach, such as the needs of the international system, the protection of justified expectations (including those of the forum state and private parties), the basic policies underlying the particular field of law, and certainty, predictability, and uniformity of result.[306]

E. Confusing Exceptions and Limitations

The existence of numerous exceptions and limitations to the act of state doctrine is further indication of the inadequacy of current act of state theories.[307] Judicial dissatisfaction with the harsh results often reached under the act of state doctrine has led courts to create numerous exceptions and limitations to temper its application. Unfortunately, the confusion that has plagued the doctrine itself also infects its exceptions and limitations.

1. The Territorial Limitation

The territorial limitation to the act of state doctrine can be traced to *Underhill's* statement of the doctrine.[308] Under this limitation, the act of state doctrine does not apply when the foreign sovereign attempts to confiscate property located in the United States.[309] Rather, only takings by

303. Callejo v. Bancomer, S.A., 764 F.2d 1101, 1124 (5th Cir. 1985).

304. *See* Note, *Resolving Debt Situs*, *supra* note 6, at 611–13.

305. *See id.* at 611 n.106 (noting the similarity between the incidents of the debt analysis and choice of law rules).

306. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971).

307. For a comprehensive discussion of the exceptions and limitations to the act of state doctrine, see Comment, *The Act of State Doctrine: A History of Judicial Limitations and Exceptions*, 18 HARV. J. INT'L L. 677 (1977).

308. *See* Underhill v. Hernandez, 168 U.S. 250, 252 (1897); *see also supra* text accompanying note 44.

309. *See* Republic of Iraq v. First Nat'l City Bank, 353 F.2d 47, 51 (2d Cir. 1965), *cert. denied*, 382 U.S. 1027 (1966); *see also supra* note 180 and text accompanying note 182.

the foreign sovereign done within its own territory are protected from judicial scrutiny.[310] As suggested earlier, the territorial nature of the doctrine can be traced to positivist and vested rights theory.[311] Only commands backed by the sovereign's power are laws; since the sovereign has plenary power within, but only within, its territory, commands that are extraterritorial in reach, and thus not backed by sovereign power, are not entitled to recognition as a matter of law by the forum sovereign.[312]

While the forum may voluntarily choose to recognize the foreign sovereign's extraterritorial law as a matter of comity,[313] a United States court is never obliged to recognize an extraterritorial foreign law that is prejudicial to the interests of its citizens or inconsistent with United States public policy.[314] A foreign sovereign's attempted confiscation of property located within the United States, an extraterritorial act that will be recognized, if at all, only as a matter of comity, generally will not be recognized because the attempted confiscation is inconsistent with United States public policy.

While there is no dispute about the vitality of the territorial limitation to the act of state doctrine, the limitation is a source of problems for the courts. Although *Sabbatino* shifted the justification of the act of state doctrine from positivist concepts of power and absolute territoriality to concerns of institutional competence, the Supreme Court retained the doctrine's territorial limitation, which is rooted in the same positivist foundations the Court already had rejected.[315] When the doctrine was one of external deference, rooted in notions of sovereign power and territoriality, it made sense to apply the doctrine only when the acts occurred within the sovereign's territory. The modern doctrine is one of internal deference based upon judicial deference to the executive's primary role in the conduct of foreign affairs. Given this rationale, there is no apparent reason to distinguish between foreign sovereign acts that occur entirely within the sovereign's territory and those acts that also attempt to affect interests in the United States.[316] In both cases, judicial action may interfere with the executive's conduct of United States foreign affairs. Yet, under the territorial limitation, the doctrine does not apply at all when the foreign sovereign attempts to take property located in the United States. The

310. *See supra* note 180.

311. *See supra* text accompanying notes 47–67.

312. *See supra* text accompanying notes 80–82.

313. *See supra* note 78.

314. *See, e.g.*, Laker Airways v. Sabena, 731 F.2d 909, 937–38 (D.C. Cir. 1984); Tahan v. Hodgson, 662 F.2d 862, 864 (D.C. Cir. 1981); Clarkson Co. v. Shaheen, 544 F.2d 624, 629 (2d Cir. 1976); Somportex Ltd. v. Philadelphia Chewing Gum Corp., 453 F.2d 435, 440 (3d Cir. 1971), *cert. denied*, 405 U.S. 1017 (1972).

315. *See supra* text accompanying notes 62–63.

316. *See* Henkin, *Foreign Affairs*, *supra* note 3, at 828.

modern formulation of the doctrine, then, has resulted in the uneasy fusion of the territorial limitation—the doctrine's principal qualification when it was a doctrine of external deference—with the doctrine's modern rationale, which is one of internal deference.

2. *The* Bernstein *Exception*

As discussed in Part I, the *Bernstein* exception relaxes the bar of the act of state doctrine when the executive indicates that judicial action will not embarrass its conduct of foreign affairs.[317] However, given the apparent disapproval of this exception by a majority of the Supreme Court in *Citibank,*[318] it is unclear whether the *Bernstein* exception is still viable.

3. *The Commercial Activity Exception*

As with the *Bernstein* exception, similar uncertainty surrounds the commercial activity exception. In *Dunhill,* Justice White's plurality opinion stated that the doctrine should not protect sovereign acts done in the course of purely commercial activities.[319] The other members of the Supreme Court, however, could not agree on whether to recognize this exception. Lower courts reflect this disagreement.[320]

4. *The Treaty Exception*

Sabbatino's statement of the act of state doctrine expressly excepted from its scope issues governed by a "treaty or other unambiguous agreement regarding controlling legal principles."[321] The Court of Appeals for the Sixth Circuit recently recognized this exception.[322]

5. *The Human Rights Exception*

The seventh tentative draft of the Restatement of Foreign Relations Law of the United States (Revised) explains this exception:

317. *See supra* note 133.

318. *See* First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 772 (1972) (Douglas, J., concurring in the result); *id.* at 777–78 (Brennan, J., dissenting, joined by Justices Stewart, Marshall, and Blackmun).

319. *See* Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 706 (1976) (plurality opinion of White, J.).

320. *See supra* note 150.

321. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964).

322. *See* Kalamazoo Spice Extraction Co. v. Provisional Military Gov't of Socialist Ethiopia, 729 F.2d 422, 427–28 (6th Cir. 1984) (treaty between United States and Ethiopia precluded application of act of state doctrine to bar American company's claim for damages sustained as result of Ethiopian expropriation of its holdings in Ethiopia).

> A claim arising out of an alleged violation of fundamental human rights—for instance, a claim on behalf of a victim of torture or genocide—would (if otherwise sustainable) probably not be defeated by the act of state defense, since the accepted international law of human rights is both well established and contemplates external scrutiny of such acts.[323]

As yet, this exception has not been recognized explicitly by the courts.

The creation of these exceptions and limitations to the act of state doctrine signals a chronic judicial dissatisfaction with the doctrine. Rather than curing the doctrine's flaws, however, the exceptions and limitations to the doctrine only contribute to the growing judicial confusion and disagreement that marks current act of state jurisprudence.

F. Inadequacy and Inconsistency of Current Act of State Theories

None of the major theories of the act of state doctrine alone provides a satisfactory explanation or account of the doctrine. Moreover, the theories, taken together, cannot be used cumulatively to justify the doctrine because they are inconsistent with each other. The choice of law and the debt situs theories are theories of external deference that focus on the circumstances under which United States courts should recognize foreign acts of state as binding law. The theory of judicial deference to the executive in the conduct of foreign affairs and the political question theory are theories of internal deference. They focus primarily on issues of institutional competence and the limitations on the role the judicial branch can play in the conduct of foreign affairs, a task reserved primarily for the executive branch.

It is evident that these two theoretical camps will lead often to inconsistent results. Whether to apply foreign law based on notions of territoriality, power, or choice of law factors may have nothing to do with whether judicial action will conflict with particular goals of foreign policy that the executive may wish to advance for political ends.[324] The existence of numerous exceptions and limitations to the act of state doctrine is further evidence of the inadequacies of current act of state theories.

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323. RESTATEMENT FOREIGN RELATIONS (Tent. Draft No. 7), *supra* note 17, § 469.

324. Thus Professor McDougal, who views the act of state doctrine as a doctrine of external deference, has stated:

> In the contemporary world in which people and goods can move so rapidly, and do in fact move so frequently, it would obviously be impossible for states to maintain any kind of order if they did not accord a reasonable amount of deference to each other's decisions . . . . It should be observed, however, . . . that [the act of state doctrine] has nothing whatsoever to do with the internal constitutional allocation of competence among the different branches of a government within a particular state such as the United States.

The Foreign Assistance Act of 1965: Hearing Before the House Committee on Foreign Affairs, 89th Cong., 1st Sess. 1035 (1965).

Act of state jurisprudence is in disarray. An uneasy composite of nineteenth century concepts of positivist law and twentieth century principles of institutional competence and federal supremacy, the act of state doctrine desperately needs reform. The doctrine must be rethought and recast in light of its origins, the major themes that have shaped its development, and the needs of the modern international legal and economic order.

III. JURISDICTION TO PRESCRIBE

A. *The Original Rationale of the Act of State Doctrine and Modern Determinants of the Scope and Limits of Sovereign Lawmaking Authority*

The prevailing theoretical framework of the *Underhill* world of international law was built on positivist concepts of law as based on power and absolute territoriality.[325] The sovereign's ability to enact valid laws was based upon its power to enforce its laws within its own territory.[326] The limits of the sovereign's ability to enact valid laws, or the limits of its jurisdiction to prescribe valid rules of law, were coextensive with its territorial boundaries. Within its territory the sovereign had plenary power to enforce its laws,[327] but these same laws had no effect in the territory of another sovereign.[328]

Originally, the act of state doctrine determined when laws of one sovereign were entitled to mandatory recognition within the territory of another sovereign. Under the *Underhill* doctrine where the foreign sovereign acted within its territory, its acts, by definition valid where done, were entitled to recognition everywhere, including in the United States. The original rationale of the act of state doctrine was that where a sovereign acted within the proper scope of its lawmaking authority, its acts were entitled to recognition by every other sovereign. The scope and limits of a

325. *See* RESTATEMENT FOREIGN RELATIONS (Tent. Draft No. 6), *supra* note 15, pt. IV, ch. 1 introductory note at 185 ("In the past, the jurisdiction of a state to make its law applicable in a transnational context tended to be determined strictly by formal criteria supposedly derived from concepts of state sovereignty (and power)."). For a general discussion of the historical development of international law and the influence of positivism, see M. AKEHURST, *supra* note 35, at 13–15; M. KAPLAN & N. KATZENBACH, *supra* note 297, at 56–80; *see also* Dickinson, *Changing Concepts and the Doctrine of Incorporation*, 26 AM. J. INT'L. L. 239, 252–253 (1932); Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 VA. L. REV. 1071, 1110–14 (1985).

326. *See supra* text accompanying notes 58–60, 62–63.

327. *See* The Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116, 136 (1812) (Marshall, C.J.) ("The jurisdiction of the nation, within its own territory is necessarily exclusive and absolute.").

328. *See* The Apollon, 22 U.S. (9 Wheat.) 362, 370 (1824) (Story, J.) ("[The laws of a nation] can have no force to control the sovereignty or rights of any other nation, within its own jurisdiction.").

sovereign's proper lawmaking authority were based on its absolute power within its own territory.[329]

Understanding the act of state doctrine's true conceptual origins leads to a new conception of the doctrine: where a foreign sovereign acts within its own proper lawmaking authority, or within its proper jurisdiction to prescribe, its acts are entitled to recognition in every other legal system.[330] The task now is to determine the modern scope and limits of a sovereign's lawmaking authority, or its jurisdiction to prescribe rules of law.

Today the scope and limits of sovereign lawmaking authority are no longer based on concepts of power and absolute territoriality. International law scholars such as Myres McDougal have challenged the rationality of basing a theory of international law on these rigid concepts.[331] Led by scholars such as Professor McDougal, Professor Lowenfeld, and (then) Professor Kingman Brewster, an intellectual movement began to advocate a thoughtful weighing of relevant interests as the basis of jurisdiction to prescribe:[332]

> [L]egislative jurisdiction [or jurisdiction to prescribe] is not like an electric light—either on or off—as would be a concept based on territory or physical power. . . . [L]egislative jurisdiction is more like a spectrum of varying color and intensity, both when viewed by the authority considering the exercise of legislative jurisdiction and when viewed by a second authority considering its response. Legislative jurisdiction, in short, is a function of reason, and of value judgments, not of strength.[333]

Concepts of power and absolute territoriality are now tempered by principles of reason and reasonableness.[334] The rule that the limits of a sovereign's proper lawmaking authority are coextensive with its territorial limits has given way to more flexible notions. National laws are now not only effective within the territory of the prescribing sovereign, but, under

329. *See supra* notes 62–63 and accompanying text.

330. *See infra* notes 338–42 and accompanying text.

331. *See, e.g.*, McDougal, *International Law, Power, and Policy: A Contemporary Conception*, 82 RECUEIL DES COURS 137 (1953); McDougal, *Law and Power*, 46 AM. J. INT'L L. 102 (1952).

332. For a discussion of the movement from an approach to legislative jurisdiction based on rigid concepts to the modern approach based on a thoughtful weighing of interests, see Lowenfeld, *Public Law in the International Area: Conflict of Laws, International Law, and Some Suggestions for their Interaction*, 163 RECUEIL DES COURS 311, 399–411 (1979). One of the first important works to advocate a flexible approach to legislative jurisdiction is K. BREWSTER, JR., ANTITRUST AND AMERICAN BUSINESS ABROAD (1958), which was published at a time when there was still substantial support for the strict territorial approach to antitrust legislation set forth by Justice Holmes in American Banana Co. v. United Fruit Co., 213 U.S. 247 (1909). *See, e.g.*, Haight, *International and the Extraterritorial Application of the Antitrust Laws*, 63 YALE L.J. 639 (1954); Whitney, *Sources of Conflict Between International Law and the Antitrust Laws*, 63 YALE L.J. 655 (1954).

333. Lowenfeld, *supra* note 332, at 326–27.

334. *See* RESTATEMENT FOREIGN RELATIONS (Tent. Draft No. 6), *supra* note 15, pt. IV, ch. 1 introductory note.

certain circumstances, are now generally recognized as effective within the territory of a foreign sovereign.[335]

The rationale of the original conception of the act of state doctrine was that acts by a sovereign within its proper lawmaking authority should be respected by all other sovereigns. Today, concepts of power and absolute territoriality, the original underpinnings of the doctrine, are no longer the sole valid measures of sovereign lawmaking authority, and can thus no longer provide a sufficient basis for the act of state doctrine. Rather, we must substitute in their place the modern ingredients that determine proper sovereign lawmaking authority. The proper scope and limits of sovereign lawmaking authority no longer are based on concepts of power and territoriality alone, but on a careful evaluation of interests, contacts, traditions, and expectations that together determine the reasonableness required by international law.[336] These ingredients, the conceptual descendants of power and absolute territoriality, are embodied in the modern analysis of a nation's jurisdiction to prescribe.

B. Analyzing the Act of State Doctrine in Terms of Jurisdiction to Prescribe

1. The General Approach

The thesis of this article is that the act of state doctrine should be analyzed in terms of the international law doctrine of jurisdiction to prescribe rules of law. In determining which nation has appropriate jurisdiction to prescribe in a given case, this article employs the analysis set forth by the Restatement of Foreign Relations Law of the United States (Revised) (hereinafter Restatement).[337] The analysis suggested below is successful in explaining the results reached under many of the previously decided major act of state cases, clarifies the application of the doctrine to cases involving intangible property, and offers a more satisfactory account of cases considered troublesome under current act of state analysis.

First, suppose that a forum court determines that a foreign sovereign has committed an act that appropriately falls within the foreign sovereign's jurisdiction to prescribe rules of law.[338] In this case, the act is governed by the legal system of the foreign sovereign and the rules of that legal system

335. *See infra* text accompanying note 363.

336. *See* Lowenfeld, *supra* note 16, at 95.

337. The Restatement of Foreign Relations Law of the United States (Revised), though not yet promulgated in final form, has been approved by the American Law Institute at its 1986 annual meeting, ending a seven-year project to revise the Restatement (Second) of Foreign Relations Law of the United States. *See supra* note 15.

338. For examples of such cases, see *infra* text accompanying notes 389–415.

alone should determine the legal consequences of the act. The forum court should adopt the rules of the foreign sovereign's legal system to adjudicate the legal status of the act. The reciprocity and deference that states owe each other in the international legal order outweigh considerations of the local public policy of the forum, and any local public policy cannot stand in the way of the result reached under the foreign sovereign's legal system.[339]

The same is not true, however, when the act of the foreign sovereign violates international law. In that case, the international legal order requires that the forum state disregard the results reached under the foreign sovereign's legal system and refuse to recognize the act. Cases where the foreign sovereign has appropriate jurisdiction to prescribe would be regarded under traditional act of state analysis as cases where the act of state doctrine barred judicial inquiry.[340]

On the other hand, the forum court may find that the dispute concerns an act over which the forum has appropriate jurisdiction to prescribe rules of law.[341] In this case, the legal consequences of the act under the foreign legal system are entitled to no recognition by the forum and the dispute is governed solely by forum laws.[342] Cases where the forum sovereign has appropriate jurisdiction to prescribe would be regarded under traditional act of state analysis as cases where the act of state doctrine did not apply and the forum courts were free to examine the validity of the foreign act of state under local law.

Analyzing the act of state doctrine in terms of jurisdiction to prescribe restores the doctrine to its origins as a principle of external deference. To this extent, the approach to the doctrine suggested by this article is at odds

339. It should be noted that this required transnational recognition of acts within a sovereign's proper lawmaking authority is a position set forth by the new proposed conception and is not clearly mandated by international law or the Restatement. *See* RESTATEMENT FOREIGN RELATIONS (Tent. Draft No. 7), *supra* note 17, § 403 comment e.

340. For an analysis in terms of jurisdiction to prescribe of the major Supreme Court cases applying the act of state doctrine applicable, see *infra* text accompanying notes 389–96. The major difference between the suggested approach and traditional act of state analysis is that under the latter, even acts in violation of international law are protected by the act of state doctrine. For a critique of this requirement, see *infra* text accompanying notes 368–69.

341. *See infra* text accompanying notes 416–25.

342. The forum may, however, voluntarily decide to recognize foreign law even where the foreign law, under accepted choice of law rules, is not otherwise the governing law if to do so would further the aims of the forum. *See, e.g.*, United States v. Pink, 315 U.S. 203, 221–26 (1941) (recognition of Soviet Union decree nationalizing property of Soviet citizens in United States was contemplated by a valid executive agreement between the United States and the Soviet Union and served to further policy of resolving international claims against Soviet Union incident to recognition of Soviet government); Banco Nacional de Cuba v. Chemical Bank, 658 F.2d 903, 908–09 (2d Cir. 1981) (recognition of attempted Cuban expropriation of property located in United States would further United States policy interests because presence of Cuban assets would establish a fund from which United States nationals with valid claims against Cuban government could be compensated).

with the *Sabbatino* approach, which views the doctrine as a principle of internal deference. It is simply not possible to embody all the concerns underlying the act of state doctrine in a new proposed conception. It should be emphasized, however, that while issues of institutional competence are not embodied in the proposed conception itself, nothing precludes a court from considering such issues as an independent matter once the court decides that the case falls within the forum's prescriptive jurisdiction. Once the court finds that a principle of external deference, such as the act of state doctrine, does not preclude the plaintiff's claim, the court can then consider, as an independent matter, whether a principle of internal deference, such as the true political question doctrine, compels dismissal of the case.[343] While jurisdiction to prescribe does not directly incorporate the concerns of institutional competence underlying the act of state doctrine, this approach is not inconsistent with an independent consideration of such concerns, and, to this extent, remains faithful to the *Sabbatino* approach to the act of state doctrine.

2. *The Restatement's Approach to the Act of State Doctrine and Jurisdiction to Prescribe*

The Restatement of Foreign Relations Law of the United States (Revised) is a comprehensive revision of the Restatement (Second) of Foreign Relations Law of the United States, promulgated by the American Law Institute in 1965.[344] In its current draft form, the Restatement contains separate chapters and sections dealing with the act of state doctrine and jurisdiction to prescribe.[345] Section 469, setting forth the Restatement's version of the act of state doctrine, provides in relevant part:

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343. An example of a case adopting this approach is Sharon v. Time, Inc., 599 F. Supp. 538 (S.D.N.Y. 1984). Plaintiff Ariel Sharon, the former Minister of Defense of the State of Israel, brought a libel action against Time, Inc. (Time), publisher of Time Magazine. Sharon alleged that he was defamed by a Time Magazine article that accused him of wrongdoing in connection with the massacre of Palestinian civilians in Israeli-occupied West Beirut, Lebanon, by members of the Christian Phalangist militia. *Id.* at 542. Time moved to dismiss on the basis of the act of state doctrine because the litigation would require consideration of the validity of various acts of the State of Israel. The court first found that the act of state doctrine did not apply. *See id.* at 544–46. The court then considered whether the case was nonjusticiable because of the concerns of the political question doctrine. Weighing the factors set forth by Baker v. Carr, 369 U.S. 186 (1962), the court held that the case was justiciable and denied Time's motion to dismiss. *See* 599 F. Supp. at 548–53.

344. *See supra* notes 16, 337.

345. The act of state doctrine is treated in Part IV, chapter 6, § 469 of the seventh tentative draft of the Restatement. Jurisdiction to prescribe is treated in Part IV, chapter 1, §§ 401–402 and 404–416 of the sixth tentative draft, and § 403 of the seventh tentative draft of the Restatement. *See* RESTATEMENT FOREIGN RELATIONS (Tent. Draft No. 6), *supra* note 15, §§ 401–402, 404–416; RESTATEMENT FOREIGN RELATIONS (Tent. Draft No. 7), *supra* note 17, §§ 403, 469.

> In the absence of a treaty or other unambiguous agreement regarding controlling legal principles, courts in the United States will generally refrain from examining the validity of a taking by a foreign state of property within its own territory, or from sitting in judgment on other acts of a governmental character done by a foreign state within its own territory and applicable there.[346]

Noting that the doctrine "has been a subject of controversy and uncertainty,"[347] the Restatement's treatment of the doctrine summarizes and reflects the current judicial confusion concerning the doctrine. For instance, the Restatement retains the rule of territoriality associated with the *Underhill* doctrine and positivist concepts of power. As demonstrated earlier, a theory of the doctrine based on power and absolute territoriality is seriously flawed for various legal and jurisprudential reasons.[348] Therefore the Restatement's treatment of the doctrine fails as an analytical tool for resolving the confusion and uncertainty concerning the doctrine.

Sections 401 through 416 of the Restatement set forth an important and comprehensive approach to the doctrine of jurisdiction to prescribe.[349] The Restatement, however, apparently sees no analytical connection between jurisdiction to prescribe and the act of state doctrine. The approach suggested by this article, then, involves a novel application of the doctrine of jurisdiction to prescribe, one that the Restatement fails to recommend or recognize.

The principal bases of jurisdiction to prescribe are set forth by section 402 of the Restatement:

> Subject to § 403, a state has jurisdiction to prescribe law with respect to
>
> (1)(a) conduct a substantial part of which takes place within its territory;
> (b) the status of persons, or interests in things, present within its territory;
> (c) conduct outside its territory which has or is intended to have substantial effect within its territory;
> (2) the activities, status, interests or relations of its nationals outside as well as within its territory; or
> (3) certain conduct outside its territory by persons not its nationals which is directed against the security of the state or a limited class of other state interests.[350]

These bases of jurisdiction are discrete and independent and the same conduct or activity may provide a basis for exercise of jurisdiction by more

346. RESTATEMENT FOREIGN RELATIONS (Tent. Draft No. 7), *supra* note 17, § 469(1).

347. *Id.* § 469(1) comment a, at 52.

348. *See infra* text accompanying notes 297–301.

349. *See* RESTATEMENT FOREIGN RELATIONS (Tent. Draft No. 6), *supra* note 15, §§ 401–402; RESTATEMENT FOREIGN RELATIONS (Tent. Draft No. 7), *supra* note 17, §§ 403, 404–416.

350. RESTATEMENT FOREIGN RELATIONS (Tent. Draft No. 6), *supra* note 15, § 402(1); *see also infra* text accompanying notes 353–56.

than one state. Indeed, the Restatement notes that "these rules do not generally provide for exclusive jurisdiction, [and] overlapping jurisdiction . . . is common in respect to transnational transactions."[351] Thus, determining whether a nation has a basis to exercise prescriptive jurisdiction is merely the first step in deciding, in cases of overlapping jurisdiction, which nation has the most appropriate claim of prescriptive jurisdiction.

Even where a nation has a basis to exercise jurisdiction, the exercise of such jurisdiction must be reasonable to be lawful.[352] Under the Restatement, "reasonableness in all the relevant circumstances is . . . an essential element in determining whether, as a matter of international law, the state has jurisdiction to prescribe."[353] The Restatement sets forth the following factors to be weighed in determining the reasonableness of a given exercise of jurisdiction to prescribe:

> (a) the extent to which the activity (i) takes place within the regulating state, or (ii) has substantial, direct, and foreseeable effect upon or in the regulating state;
>
> (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the persons principally responsible for the activity to be regulated, or between that state and those whom the law or regulation is designed to protect;
>
> (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;
>
> (d) the existence of justified expectations that might be protected or hurt by the regulation in question;
>
> (e) the importance of the regulation in question to the international political, legal or economic system;
>
> (f) the extent to which such regulation is consistent with the traditions of the international system;
>
> (g) the extent to which another state may have an interest in regulating the activity; and
>
> (h) the likelihood of conflict with regulation by other states.[354]

When more than one state has a reasonable basis to exercise jurisdiction to prescribe over persons or conduct, each state should evaluate its own

351. RESTATEMENT FOREIGN RELATIONS (Tent. Draft No. 6), *supra* note 15, pt. IV, ch. 4, introductory note. Professor McDougal has noted that "[i]n an interdependent world, in which everything affects everything else and markets and resources are widely distributed, it should not be surprising that these grants of competence often confer jurisdiction upon more than one state over the same events." *The Foreign Assistance Act of 1965: Hearings Before the House Committee on Foreign Affairs*, 89th Cong., 1st Sess. 1034 (1965).

352. *See* RESTATEMENT FOREIGN RELATIONS (Tent. Draft No. 7), *supra* note 17, § 403(1).

353. *Id.* § 403 reporters' notes 10, at 14.

354. *Id.* § 403(1), (2).

interests as well as those of the other state in exercising such jurisdiction.[355] Each state should make this evaluation in light of all the relevant factors, including those set forth above, and "should defer to the other state if that state's interest is clearly greater."[356]

Within each state, who does the evaluating? According to Professor Lowenfeld, Associate Reporter of the Restatement, the evaluating is done by the legislature as it drafts a statute or regulation, and by the courts or administrative tribunals of the nation seeking to assert its prescriptive jurisdiction; the evaluating is done as well by the legislature and courts of the nation that may be affected by the laws in question.[357] The thought is that although all who do the evaluating may not agree on the same judgment, each nation will bear reduced resentment and derive some satisfaction from the knowledge that the other nation has considered the question of jurisdiction under a common standard.[358]

It should be possible in most cases to reach an agreement on which nation's legal system has a more appropriate basis to exercise prescriptive jurisdiction. In the words of Professor Lowenfeld, "[i]n short, the jurisdiction is not determined by a fixed standard, but by a standard nonetheless. Even if drawing fine lines is sometimes difficult, that does not mean that most situations do not fall fairly clearly on one side or the other."[359]

C. *Advantages of an Analysis of the Act of State Doctrine in Terms of Jurisdiction to Prescribe*

1. *Reciprocal Respect and Mutual Tolerance for Diverse Legal and Political Systems*

Justifying an analysis of the act of state doctrine in terms of jurisdiction to prescribe begins with the observation that it is an essential, definitional element of sovereignty that each nation has the right of self-determination and the concomitant prerogative to prescribe laws governing the conduct, relations, status or interests of persons or things within its own territory.[360] Traditionally, a sovereign's authority to prescribe laws was plenary within its territory,[361] but the sovereign had no competence to act within the

355. *See id.* § 403(3).
356. *Id.*
357. *See* Lowenfeld, *supra* note 332, at 330–31.
358. *See* Lowenfeld, *supra* note 16, at 93.
359. *Id.* at 95.
360. *See* FTC v. Compagnie de Saint-Gobain-Pont-a-Mousson, 636 F.2d 1300, 1316 (D.C. Cir. 1980).
361. *Id.* (citing The Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116 (1812)).

territory of another nation.[362] Under the Restatement, a nation not only has prescriptive jurisdiction within its own territory, but also over certain conduct outside of its territory.[363]

Under principles of international law, then, each nation has a proper domain of legislative competence within which it may legitimately act to affect the legal status of persons or things. The act of state doctrine, as interpreted here, recognizes that where a nation acts within its proper domain of lawmaking authority, every other nation should recognize these acts even if to do so would contravene local public policy.

This proposed view of the act of state doctrine recognizes that the world is composed of discrete and diverse legal systems, each of equal status and each entitled to the respect and recognition accorded to equals so long as each acts within its proper domain.[364] This view takes a neutral stance with respect to the substantive content of particular legal systems and the political philosophy or ideology any legal system may embody. The point is not that acts reflecting certain political values will be accorded recognition, but that acts by a sovereign within its own and proper domain are entitled to recognition by all other sovereigns, whatever the values reflected by those acts, so long as the acts do not violate international law.[365] The values served by the proposed new conception of the act of state doctrine are those of reciprocal respect for diverse political and legal systems. As stated by Professor Falk:

> In the presence of diversity, the act of state doctrine performs a valuable function in international society. It allocates jurisdictional competence on the basis of a reciprocal pattern of deference by which national actors are given mutual assurance that their activity will receive universal respect if carried on within jurisdictional limits (simplified in the *Sabbatino* discussion to refer to the control of tangible property located within territory). Such deference accords with the facts of decentralization and ideological cleavage that exist in international society today.[366]

362. *Id.* (quoting The Appollon, 22 U.S. (9 Wheat.) 363, 370 (1824)).

363. *See* RESTATEMENT FOREIGN RELATIONS (Tent. Draft No. 6), *supra* note 15, § 402.

364. *Cf.* International Ass'n of Machinists and Aerospace Workers v. OPEC, 649 F.2d 1354, 1357 (9th Cir. 1981) ("In the international sphere each state is viewed as an independent sovereign, equal in sovereignty to all other states. It is said that an equal holds no power of sovereignty over an equal." (footnote omitted)), *cert. denied,* 454 U.S. 1163 (1982).

365. *See infra* text accompanying notes 368–69.

366. R. FALK, INTERNATIONAL SOCIETY, *supra* note 3, at 412; *see also* Katzenbach, *supra* note 57, at 1152–53 (mutual tolerance necessary to maintain international integrity of sovereign decisions). Professor Falk's defense of the act of state doctrine is based, in part, upon the following:

> [I]n general, courts should avoid interference in the domestic affairs of other states when the subject matter of disputes illustrates a legitimate diversity of values on the part of two national societies. In contrast, if the diversity can be said to be illegitimate, as when it exhibits an abuse of universal human

The proposed new conception of the act of state doctrine can also be justified from a practical point of view. Professor McDougal suggests that in our modern world, the doctrine serves a particularly useful end:

> Like a "full faith and credit clause" in a national constitution, the genuine "acts of state" doctrine seeks to secure that, despite the continuous movement of persons and goods, the basic substantive policies of international law—including both the jurisdictional policies allocating competence among states and the basic limitations designed to restrain the arbitrary exercise of this competence are made effective across nation-state lines. In the contemporary world in which people and goods can move so rapidly, and do in fact move so frequently, it would obviously be impossible for states to maintain any kind of order, much less one of security and abundance, if they did not accord a reasonable deference to each other's decisions taken in conformity with international law.[367]

Under an analysis of the act of state doctrine in terms of jurisdiction to prescribe, forum courts should not recognize foreign sovereign acts that violate international law. One goal of the proposed new conception of the act of state doctrine is to promote international order and stability by requiring all legal systems to recognize acts done within the legislative competence of a particular legal system. Forum courts would undermine the stability and integrity of the international legal order if they recognized acts in violation of international law. In the words of Professor McDougal, "[i]t would be a complete perversion of . . . this doctrine to convert it into an independent doctrine for the protection of unlawful transactions."[368] As a report on the act of state doctrine by the Committee on International Law of the Association of the Bar of the City of New York stated several years prior to *Sabbatino:*

> A refusal of courts to consider foreign acts of state in light of the law of nations is not, it should be remembered, merely a neutral doctrine of abstention. On the contrary the effect of such a doctrine is to lend the full protection

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rights, then domestic courts fulfill their role by refusing to further the policy of the foreign legal system. In instances of illegitimate diversity, where a genuine universal sentiment exists, then the domestic courts properly act as agents of international order only if they give maximum effect to such universality.

R. FALK, INTERNATIONAL LEGAL ORDER, *supra* note 3, at 72.

The problem with Professor Falk's justification of the doctrine is that it requires courts to distinguish between legitimate and illegitimate diversity of values. One might wonder whether domestic courts are suited to decide issues involving the values of national societies and what standards courts are to use in making determinations of legitimacy with respect to differences in values across national societies. Under the approach suggested by this article, the application of the act of state doctrine depends on a determination that is neutral with respect to the substantive content of political or social ideologies; courts must decide whether the dispute falls within the legislative competence of the foreign or forum nation.

367. M. MCDOUGAL, *supra* note 119, at 338.

368. *Id.* at 339; *see also* R. FALK, INTERNATIONAL LEGAL ORDER, *supra* note 3, at 72.

> of the United States courts, police and governmental agencies to commercial or property transactions which are contrary to minimum standard of civilized conduct . . . .[369]

A necessary corollary of an act of state analysis in terms of jurisdiction to prescribe is that no legal system is required to recognize sovereign acts outside the prescriptive jurisdiction of another legal system. A legal system may voluntarily choose to recognize such acts, but it is not required to do so.[370]

2. *A Valid Basis in Federal Law*

The doctrine of jurisdiction to prescribe is governed by rules of international law,[371] which are part of the federal law of the United States.[372] Thus, the legal mechanisms of the suggested conception of the act of state doctrine do not need to be fashioned anew but are an existing, though often overlooked, part of our law.

Analyzing the act of state doctrine in terms of jurisdiction to prescribe satisfies Justice Harlan's quest for a federal basis for the doctrine.[373] The act of state doctrine, then, would be federal law, binding all fifty states and subject to the ultimate authority of the Supreme Court.

3. *Fundamental Explanatory Power*

The doctrine of jurisdiction to prescribe is a fundamental and powerful concept that has broad ramifications for many areas of the law. The doctrine of absolute and restrictive sovereign immunity can also be analyzed in

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369. COMMITTEE ON INTERNATIONAL LAW, THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, A RECONSIDERATION OF THE ACT OF STATE DOCTRINE IN UNITED STATES COURTS 8 (1959).

370. *See supra* note 342.

371. *See* Laker Airways Ltd. v. Sabena, 731 F.2d 909, 922 (D.C. Cir. 1984); FTC v. Compagnie de Saint-Gobain-Pont-A-Mousson, 636 F.2d 1300, 1315 (D.C. Cir. 1980); United States v. Crews, 605 F. Supp. 730, 734 (S.D. Fla. 1985); *In re* Uranium Antitrust Litigation, 480 F. Supp. 1138, 1144 (N.D. Ill. 1979); *see also* RESTATEMENT FOREIGN RELATIONS (Tent. Draft No. 6), *supra* note 15, § 401 & comment b.

372. It has been long established that international law is part of the law of the United States. *See, e.g.*, The Paquete Habana, 175 U.S. 677, 700 (1900); Hilton v. Guyot, 159 U.S. 113, 163 (1895); The Nereide, 13 U.S. (9 Cranch) 388, 423 (1815); Demjanjuk v. Petrovsky, 776 F.2d 571, 582 (6th Cir.), *cert. denied*, 106 S. Ct. 1198 (1986); United States v. Crews, 605 F. Supp. 730, 734 (S.D. Fla. 1985); *see also* Henkin, *supra* note 251, at 1561.

373. *See supra* text accompanying notes 112–17; *see also supra* note 251. It has been recently recognized that international law is part of federal law. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423–27 (1964); R. FALK, INTERNATIONAL LEGAL ORDER, *supra* note 3, at 419; RESTATEMENT FOREIGN RELATIONS (Tent. Draft No. 6), *supra* note 15, § 131; Henkin, *supra* note 251, at 1557–60.

terms of jurisdiction to prescribe.[374] Professor Singer has argued that where the sovereign has committed acts within its own exclusive jurisdiction to prescribe, the sovereign has absolute sovereign immunity and is immune from judgment elsewhere.[375] On the other hand, where the foreign sovereign acts outside its own jurisdiction to prescribe and within the exclusive prescriptive jurisdiction of the forum, the sovereign has no sovereign immunity but is viewed as a private actor subject to suit in the courts of the forum.[376]

In addition, the exceptions to the act of state doctrine can be incorporated directly into the main analysis of jurisdiction to prescribe. Under the territorial limitation, the act of state doctrine does not apply when the sovereign attempts to confiscate property located in the territory of the United States, and United States courts, free to inquire into the validity of the sovereign act under domestic law, generally will not recognize the attempted taking.[377] Under the doctrine of jurisdiction to prescribe, a foreign sovereign, absent a showing of an independent basis to exercise jurisdiction to prescribe, is without a valid basis to enact laws purporting to affect property located in another sovereign's territory.[378] If the property is located in the forum, and the foreign sovereign lacks an independent basis to exercise prescriptive jurisdiction over the property,[379] the forum court need not recognize the acts of the foreign sovereign. Under the Restatement approach, the element of territoriality is viewed not as an exception but as an integral element of the analysis of the lawfulness of the foreign sovereign's exercise of jurisdiction to prescribe.

Under the commercial activity exception, the foreign sovereign is not protected by the act of state doctrine when it descends to the level of the entrepreneur and pursues purely commercial activities.[380] When this exception applies, foreign sovereign acts are subject to full judicial scrutiny in

374. *See* Singer, *Abandoning Restrictive Sovereign Immunity: An Analysis in Terms of Jurisdiction to Prescribe*, 26 HARV. J. INT'L L. 1 (1985). Professor Singer has noted that an approach based on jurisdiction to prescribe provides a doctrinal basis for dealing with act of state cases together with those dealing with sovereign immunity. *See id.* at 14.

375. *Id.* at 30.

376. *Id.* at 36.

377. *See supra* note 182.

378. A state is without a basis to exercise jurisdiction to prescribe with respect to "interests in things, present within [the] territory" of another state. *See* RESTATEMENT FOREIGN RELATIONS (Tent. Draft No. 6), *supra* note 15, § 402(1)(b).

379. A state may have a valid basis upon which to exercise jurisdiction to prescribe with respect to property located abroad. For example, a state has a basis to prescribe laws affecting the interests of its nationals in property located in the territory of a foreign sovereign. *See* RESTATEMENT FOREIGN RELATIONS (Tent. Draft No. 6), *supra* note 15, § 402(2).

380. *See supra* text accompanying notes 150, 319.

United States courts.[381] Under the doctrine of jurisdiction to prescribe, where the foreign sovereign engages in a course of commercial activities with the forum, the forum may have the appropriate jurisdiction to prescribe with respect to those activities.[382] The foreign sovereign cannot then effectively amend the legal relationships arising out of those commercial dealings because it lacks the appropriate authority to prescribe with respect to those activities. Any attempts by the foreign sovereign to alter the legal rights involved in those commercial dealings, then, need not be recognized by the forum courts. The commercial nature of the activity involved is not seen as an exception, but as a factor to be weighed in determining which sovereign has the more appropriate basis to exercise jurisdiction to prescribe.

The treaty exception to the doctrine excepts from the doctrine's scope issues governed by treaty or other explicit agreement between nations. Viewed in terms of the proposed new conception of the act of state doctrine, the treaty exception is simply the recognition that nations may enter into binding agreements among themselves on particular allocations of jurisdiction to prescribe.

The human rights exception lifts the bar of the act of state doctrine when a sovereign act involves an alleged violation of fundamental human rights. Under the proposed new conception of the doctrine, acts otherwise within the legislative competence of a particular sovereign should nevertheless be refused recognition by all other sovereigns if those acts violate international law.[383]

The investment of scholarly and judicial energy into developing the doctrine of jurisdiction to prescribe is of great significance in the modern international legal and economic order. Today, "governments . . . regulate, license, tax, and punish more and more activity of all kinds; and . . . more and more activities are carried on across national boundaries—not only trade, but investment, communications, transport, [and] financial transactions."[384] The United States has provoked international tension and resentment as it has attempted to extend the reach of its antitrust and securities laws to their farthest limits.[385] The development of an interna-

381. *See* Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 706 (1976) (plurality opinion of White, J.); *see also supra* note 150.

382. For an example, see Trendtex Trading Corp. v. Central Bank of Nigeria, [1977] 1 Q.B. 529, discussed *infra* at text accompanying notes 422–25.

383. *See supra* text accompanying notes 368–69.

384. Lowenfeld, *supra* note 332, at 325.

385. *See* Timberlane Lumber Co. v. Bank of Am. Nat'l Trust & Sav. Ass'n, 549 F.2d 597, 609 (9th Cir. 1976) ("Extraterritorial application [of United States antitrust laws] is understandably a matter of concern for the other countries involved. Those nations have sometimes resented and protested, as excessive intrusions into their own spheres, broad assertions of authority by American courts."); *see* J. ATWOOD & K. BREWSTER, ANTITRUST AND AMERICAN BUSINESS

tional doctrine of jurisdiction to prescribe may help to lessen tension by promoting a common understanding of agreed upon limits.

The fundamental explanatory power of the doctrine of jurisdiction to prescribe offers an important promise. Diverse and independent legal doctrines, such as the act of state doctrine and its exceptions, the doctrine of sovereign immunity, and the extraterritorial application of laws, can be analyzed under this single, unified approach. Scholars and jurists may even deem it appropriate to abandon altogether the labels for these independent doctrines and instead work toward the development of a fundamental international law of the transnational recognition of sovereign legal systems.

4. *Participation of United States Courts in Developing International Law*

According to many international legal scholars, the most serious vice of the act of state doctrine is that it inhibits the development of international law by United States courts.[386] Justice Powell made this point in his concurring opinion in *Citibank*:

> Until international tribunals command a wider constituency, the courts of various countries afford the best means for the development of a respected body of international law. There is less hope for progress in this long-neglected area if the resolution of all disputes involving an "act of state" is relegated to political rather than judicial processes.[387]

Under current act of state analysis, whenever the doctrine is applicable, United States courts are foreclosed from deciding international law issues. Scholars have accused the doctrine of requiring the "judicial abdication"[388]

ABROAD § 1.01, at 5 (2d ed. 1981) ("foreign businesses and governments continue to state their irritated astonishment when United States antitrust laws are imposed on arrangements thought to be beyond the proper reach of American law"); Comment, *The Sovereign Compulsion Defense in Antitrust Actions and the Role of Statements by Foreign Governments*, 62 WASH. L. REV. 129, 130 (1987) ("Use of United States domestic law to regulate conduct abroad has evoked a considerable number of hostile responses from foreign governments." (footnote omitted)); *see also* A. NEAL & D. GOYDER, THE ANTITRUST LAW OF THE UNITED STATES OF AMERICA 346–48, 357–68 (3d ed. 1980); THE MULTINATIONAL CORPORATION IN THE WORLD ECONOMY: DIRECT INVESTMENT IN PERSPECTIVE 60 (S. Rolfe & W. Damm eds. 1970); RESTATEMENT FOREIGN RELATIONS (Tent. Draft No. 6), *supra* note 15, introductory note.

386. *See, e.g.*, Bazyler, *supra* note 3, at 381–84; Lillich, *The Proper Role of Domestic Courts in the International Legal Order*, 11 VA. J. INT'L L. 9, 11 (1970); Mathias, *supra* note 3, at 414; Wallace, *supra* note 13, at 25. *See also Act of State Hearings*, *supra* note 3, at 28 (abolishing the act of state doctrine "would enhance the capacity of the courts of the United States to contribute to the progressive and sound development of international law") (prepared statement of Prof. Don Wallace, Jr.).

387. First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 775 (1972) (Powell, J., concurring in the judgment).

388. Lillich, *supra* note 386, at 11.

by United States courts of their responsibility to contribute to international law.

The approach to the doctrine suggested by this article, because it is based upon the international law doctrine of jurisdiction to prescribe, answers the most persistent criticism of the doctrine by legal scholars—that it arrests the development of international law by United States courts.

5. *Clarification of Current Act of State Cases Involving Intangible Property*

As set forth in greater detail below, jurisdiction to prescribe provides a rational and understandable approach for resolving the increasing number of act of state cases involving intangible property. Finding that existing act of state jurisprudence cannot resolve disputes involving sovereign acts affecting intangible property, courts and commentators have fashioned new tests. Yet these new tests consist of fresh sets of rules with no apparent connection to existing rules already crowding the conceptual warehouse of act of state theories. The proposed new conception of the act of state doctrine will simplify, not multiply, the number of rules applicable under the act of state doctrine.

D. *Applying an Analysis of the Act of State Doctrine in Terms of Jurisdiction to Prescribe*

1. *Prescriptive Jurisdiction of the Foreign Sovereign*

Oetjen[389] and *Ricaud*[390] provide rare examples of acts that fall within the foreign sovereign's exclusive jurisdiction to prescribe. Both cases involved the seizure of property by a Mexican general from citizens of Mexico.[391] The property eventually entered the United States where the owners or their successors in interest asserted ownership. The Mexican government, in seizing the property from its own citizens, performed an act within its own jurisdiction to prescribe.[392] Moreover, no other nation could claim a basis of jurisdiction to prescribe over the acts in question. The acts of the Mexican government, then, fell within its exclusive jurisdiction to prescribe. Because the acts of the Mexican government were within its proper sphere of legislative competence and were not in violation of international

389. 246 U.S. 297 (1918); *see supra* text accompanying notes 70–75 and *supra* note 75.
390. 246 U.S. 304 (1918); *see supra* text accompanying notes 70–75.
391. *See supra* text accompanying note 72.
392. *See* RESTATEMENT FOREIGN RELATIONS (Tent. Draft No. 6), *supra* note 15, § 402(1)(b).

law,[393] they were entitled to recognition in all other legal systems, including the courts of the United States.[394]

Underhill is a case in which prescriptive jurisdiction rests, on balance, with the foreign sovereign. The nationality of plaintiff Underhill provided a basis for the United States to exercise jurisdiction to prescribe.[395] However, the entire episode occurred in Venezuela, where General Hernandez ordered Underhill to operate his water works for the revolutionary army. Venezuela thus had a more reasonable claim to regulate conduct occurring within its territory as well as the status of persons within its territory.[396]

Likewise, *International Association of Machinists (IAM) v. OPEC*[397] is a case in which jurisdiction to prescribe rests, on balance, with the foreign sovereign. A labor union charged the OPEC member nations with price-fixing in violation of the United States antitrust laws.[398] The Ninth Circuit held that the act of state doctrine applied to bar the plaintiff's complaint.[399] Framed in light of the present analysis, the issue in *OPEC* was whether the United States could properly assert its jurisdiction to prescribe its antitrust laws to govern conduct by the OPEC nations.

There was precedent in the Ninth Circuit for an analysis of the issues in *OPEC* in terms of jurisdiction to prescribe. A few years prior to *OPEC*, the Ninth Circuit considered the question of the extraterritorial reach of the antitrust laws in a similar case. In *Timberlane Lumber Co. v. Bank of America*,[400] an American milling manufacturer claimed that defendants had conspired with Honduran officials to force plaintiff out of the lumber business in that country.[401] The district court had dismissed the complaint on the ground that the alleged conspiracy did not produce a substantial effect on commerce within the United States.[402] In its opinion, the Ninth

393. *See* De Sanchez v. Banco Central de Nicaragua, 770 F.2d 1385, 1395 (5th Cir. 1985) ("[I]nternational law . . . does not purport to interfere with the relations between a nation and its own citizens . . . . [E]ven if [Nicaragua's] actions might have violated international law had they been taken with respect to an alien's property, [because] they [confiscated] property rights of a Nicaraguan national . . . [,] they were outside the ambit of international law."); *see also* United States v. Belmont, 301 U.S. 324, 332 (1936) ("What another country has done in the way of taking over property of its nationals . . . is not a matter for judicial consideration here. Such nationals must look to their own government for any redress to which they may be entitled.").

394. *See supra* text accompanying notes 338–39.

395. *See* RESTATEMENT FOREIGN RELATIONS (Tent. Draft No. 6), *supra* note 15, § 402(2).

396. *Id.* § 402(1)(a),(b).

397. 649 F.2d 1354 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982); *see supra* text accompanying notes 164–75.

398. 649 F.2d at 1355.

399. *Id.* at 1358–62.

400. 549 F.2d 597 (9th Cir. 1976).

401. *Id.* at 604–05.

402. The district court applied the then prevailing standard for determining the extraterritorial reach of the United States antitrust laws. Under the *ALCOA* standard set forth by Judge Learned

Circuit identified one of the major issues of the case:

> [T]here is the . . . question which is unique to the international setting of whether the interests of, and links to, the United States—including the magnitude of the effect on American foreign commerce—are sufficiently strong vis-a-vis those of other nations, to justify an assertion of extraterritorial authority.[403]

Finding that the effects test adopted by the district court was too rigid, the Ninth Circuit stated:

> An effect on United States commerce, although necessary to the exercise of jurisdiction under the antitrust laws, is alone not a sufficient basis on which to determine whether American authority *should* be asserted in a given case as a matter of international comity and fairness. In some cases, the application of the direct and substantial test in the international context might open the door too widely by sanctioning jurisdiction over an action when these considerations would indicate dismissal. At other times, it may fail in the other direction, dismissing a case for which comity and fairness do not require forebearance, thus closing the jurisdictional door too tightly—for the Sherman Act does reach some restraints which do not have both a direct and substantial effect on the foreign commerce of the United States. A more comprehensive inquiry is necessary. . . . What we prefer is an evaluation and balancing of the relevant considerations in each case—in the words of Kingman Brewster, a "jurisdictional rule of reason."[404]

The Ninth Circuit remanded the case to the district court to determine whether the United States' jurisdiction to prescribe its antitrust laws reached the conduct in question.[405]

Finding the *Timberlane* analysis persuasive, the Third Circuit adopted its analysis in another case involving the extraterritorial application of United States antitrust laws. In *Mannington Mills v. Congoleum Corp.*,[406] Mannington Mills, an American manufacturer of vinyl floor coverings, alleged that Congoleum fraudulently had procured patents abroad for vinyl and, in violation of the Sherman Act, was threatening to bring infringement actions abroad against Mannington Mills.[407] The district court ruled in

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Hand, proven effects on American commerce that were intended may subject wholly foreign conduct to jurisdiction. *See* United States v. Aluminum Co. of Am. (ALCOA), 148 F.2d 416, 443 (2d Cir. 1945); *see also* 1 J. ATWOOD & K. BREWSTER, JR., *supra* note 385, §§ 6.05–.08, at 147–56.

403. *Timberlane*, 549 F.2d at 613.

404. *Id.* (emphasis in original) (quoting K. BREWSTER, JR., ANTITRUST AND AMERICAN BUSINESS ABROAD 446 (1958)).

405. On remand, however, the district court found that the antitrust laws did not reach the conduct in question and again dismissed the case. On appeal, the Ninth Circuit affirmed. *See* Timberlane Lumber Co. v. Bank of Am. Nat'l Trust & Sav. Ass'n, 574 F. Supp. 1453 (N.D. Cal. 1983), *aff'd*, 749 F.2d 1378 (9th Cir. 1984).

406. 595 F. 2d 1287 (3d Cir. 1979).

407. *Id.* at 1290.

favor of Congoleum on the ground that the act of state doctrine barred the antitrust action.[408] The Third Circuit disagreed that the doctrine applied.[409] The Third Circuit viewed the extraterritorial application of the antitrust laws as a dispositive issue:

> This may, indeed, be a situation where the consequences to the American economy and policy permit no alternative to firm judicial action enforcing our antitrust laws abroad. But before that step is taken, there should be a weighing of competing interests.
>
> . . . .
>
> In [*Timberlane,* the Ninth Circuit] adopted a balancing process in determining whether extraterritorial jurisdiction should be exercised, an approach with which we find ourselves in substantial agreement.[410]

The *Mannington Mills* court then set forth factors to be weighed in determining whether the antitrust laws applied extraterritorially in a given case, factors similar to the Restatement's factors of the reasonableness of a given exercise of jurisdiction to prescribe.[411]

An analysis in terms of jurisdiction to prescribe, reflected in the approaches used by *Timberlane* and *Mannington Mills,* offers a better understanding of *OPEC*. To start with, under section 402(1)(c),[412] the United States has a basis to exercise jurisdiction to prescribe because the OPEC nations have engaged in conduct having a substantial effect within the United States. However, the exercise of jurisdiction must still meet the reasonableness criteria of section 403.[413] The United States seeks to

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408. *Id.*

409. *Id.* at 1293–94.

410. *Id.* at 1296, 1297.

411. The factors listed by the court were:

1. Degree of conflict with foreign law or policy;
2. Nationality of the parties;
3. Relative importance of the alleged violation of conduct here compared to that abroad;
4. Availability of a remedy abroad and the pendency of litigation there;
5. Existence of intent to harm or affect American commerce and its foreseeability;
6. Possible effect upon foreign relations if the court exercises jurisdiction and grants relief;
7. If relief is granted, whether a party will be placed in the position of being forced to perform an act illegal in either country or be under conflicting requirements by both countries;
8. Whether the court can make its order effective;
9. Whether an order for relief would be acceptable in this country if made by the foreign nation under similar circumstances;
10. Whether a treaty with the affected nations has addressed the issue.

Id. at 1297–98. Commentators have noted that "Timberlane and Mannington Mills provide an analytically sound framework for determining the proper scope of Sherman Act extraterritorial jurisdiction." 1 J. ATWOOD & K. BREWSTER JR., *supra* note 385, § 6.22, at 180.

412. *See* RESTATEMENT FOREIGN RELATIONS (Tent. Draft No. 6), *supra* note 15, § 402(1)(c).

413. *See* RESTATEMENT FOREIGN RELATIONS (Tent. Draft No. 7), *supra* note 17, § 403.

regulate the actual conduct of foreign nations, which is an intrusion into the most basic and primary area of the other countries' jurisdiction.[414] To be reasonable, such an intrusion must meet a heavy burden of showing that the basic harm is so serious that an intrusion is justified and, that without such an intrusion, the basic harm will continue.[415] It is doubtful that the forum nation, here the United States, can show that its exercise of jurisdiction to prescribe price-fixing laws reasonably extends to the OPEC nations. Accordingly, the complaint should have been dismissed on the ground that the antitrust laws do not reach, in this case, the activities of OPEC member nations.

2. *Prescriptive Jurisdiction of the Forum*

In *Republic of Iraq v. First National City Bank,*[416] jurisdiction to prescribe rests, on balance, with the forum nation. In that case, the Republic of Iraq issued decrees that purported to confiscate the property of its deposed monarch, King Faisal II.[417] The property was held in deposit and custody accounts by an American bank in New York City.[418] Iraq's only connection to the accounts was based on the nationality of the holder of those accounts. Judge Friendly refused to recognize Iraq's claim that it had prescriptive jurisdiction over the accounts:

> Although the nationality of King Faisal provided a jurisdictional basis for the Republic of Iraq to prescribe a rule relating to his property outside Iraq . . . [,] this simply gives the confiscation decree a claim to consideration by the forum which, in the absence of such jurisdiction, it would not possess—not a basis for insisting on the absolute respect which . . . the decree would enjoy as to property within Iraq at the time.[419]

The court went on to hold the act of state doctrine inapplicable and refused to recognize the confiscation decrees.[420] Judge Friendly's holding is consistent with the view that "[t]erritoriality is considered the normal, and nationality the exceptional, basis for the exercise of jurisdiction."[421]

414. As the Ninth Circuit stated, plaintiff's request that OPEC be found liable under United States antitrust laws "would in effect amount to an order from a domestic court instructing a foreign sovereign to alter its chosen means of allocating and profiting from its own valuable natural resources." International Ass'n of Machinists & Aerospace Workers v. OPEC, 649 F.2d 1354, 1361 (9th Cir. 1981), *cert. denied,* 454 U.S. 1163 (1982).

415. *Cf.* Lowenfeld, *supra* note 332, at 386.

416. 353 F.2d 47 (2d Cir. 1965), *cert. denied,* 382 U.S. 1027 (1966).

417. 353 F.2d at 49.

418. *Id.*

419. *Id.* at 51.

420. *Id.*

421. RESTATEMENT FOREIGN RELATIONS (Tent. Draft No. 6), *supra* note 15, § 402 comment b.

Trendtex Trading Corp. v. Central Bank of Nigeria,[422] a sovereign immunity case, is another example in which jurisdiction to prescribe rests, on balance, with the forum. The case involved a contract for the purchase by the Nigerian Ministry of Defense of cement to be used for building houses, factories, and army barracks.[423] Lord Denning found that the contracts were private activity and thus could not provide the basis of a claim of sovereign immunity. He continued:

> There is another answer. Trendtex here are not suing on the contracts of purchase. They are claiming on the letter of credit which is an entirely separate contract. It was a straightforward commercial transaction. The letter of credit was issued in London through a London bank in the ordinary course of commercial dealings. It is completely within the territorial jurisdiction of our courts. I do not think it is open to the Government of Nigeria to claim sovereign immunity in respect of it.[424]

Lord Denning's statement that the letter of credit was within the "territorial jurisdiction" of the English courts is a reference to the English doctrine of the proper law of a contract.[425] In *Trendtex,* the proper law of the contract was English law because England had proper jurisdiction to prescribe with respect to commercial transactions in London by a London bank. English law alone, then, determined rights and liabilities under the contract. Nigeria's attempt to alter the liabilities under the contract, whether based on a claim of sovereign immunity or the act of state doctrine, was therefore irrelevant.

3. *Recent Cases Involving Intangible Property*

Faced with novel issues of acts of state affecting intangible property, courts continued to think in terms of rigid concepts of territoriality. As a result, courts attempted to situate intangible property, an enterprise that presented inherent difficulties because intangible property, by definition, has no physical location. Searching for guidance, courts resurrected the *Harris* rule, which locates the debt where courts can obtain personal jurisdiction over the debtor.[426]

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422. [1977] 1 Q.B. 529.

423. *Id.* at 548.

424. *Id.* at 558.

425. *See* 2 J.H.C. MORRIS, L. COLLINS, J.D. MCCLEAN & M. MANN, *supra* note 238:

> The term "proper law of a contract" means the system of law by which the parties intended the contract to be governed, or, where their intention is neither expressed nor to be inferred from the circumstances, the system of law with which the transaction has its closest and most real connection.

Id. at 747; *see also* P.M. NORTH, CHESHIRE & NORTH PRIVATE INTERNATIONAL LAW 195–212 (10th ed. 1979).

426. *See supra* text accompanying notes 278–83.

Aside from practical difficulties associated with the rule,[427] the *Harris* approach is inappropriate in the act of state context because it concerns jurisdiction to adjudicate rather than jurisdiction to prescribe. Today, *Harris* stands for the simple proposition that where a court has personal jurisdiction over a debtor consistent with due process requirements, the court can render a valid judgment adjudicating that debtor's personal liability.[428] Whether a forum court has the power to render a valid judgment, however, does not address act of state concerns. Assuming a forum court has jurisdiction to adjudicate, the act of state doctrine concerns what effect the forum court should accord to an act of state in the exercise of that adjudicative jurisdiction.[429]

The transnational effect of an act of state depends on whether the state had the competence to affect the legal rights involved. That is an issue of jurisdiction to prescribe. An act of state analysis based upon the *Harris* rule of adjudicative jurisdiction is thus fundamentally misdirected. In the words of Professor Lowenfeld, "[T]he unquestioned existence of judicial jurisdiction over a person, firm, or ship—even when it is based on an activity—does not necessarily carry with it legislative jurisdiction over all aspects of that activity."[430]

Under the proposed new conception of the act of state doctrine, the relevant inquiry is whether the foreign sovereign has proper jurisdiction to prescribe over the legal source of the intangible property rights. In cases such as *Allied Bank* involving sovereign defaults on loan agreements,[431] the central issue is whether the foreign sovereign has the legislative competence to alter the loan contract rights in dispute. In particular, the crucial issue in *Allied Bank* was whether Costa Rica had the appropriate jurisdiction to prescribe with respect to the loan contracts.

On one hand, under section 402, both the United States and Costa Rica have a basis to exercise jurisdiction to prescribe with respect to the loan agreements. The United States' claim is based on links of territoriality under section 402(1)(a)–(c).[432] Some negotiations for the contract took place in the United States; Allied Bank, the designated agent, was located

427. *See supra* text accompanying notes 284–88.

428. Shaffer v. Heitner, 433 U.S. 186 (1977), substantially overruled *Harris* on its facts. *See supra* note 187.

429. If the forum court does not have jurisdiction to adjudicate, the act of state issue would not arise at all because the party who asserts the act of state doctrine should move to dismiss for lack of territorial jurisdiction.

430. Lowenfeld, *supra* note 332; *see* RESTATEMENT FOREIGN RELATIONS (Tent. Draft No. 6), *supra* note 15, § 421 comment a.

431. *See supra* text accompanying notes 192–206.

432. *See* RESTATEMENT FOREIGN RELATIONS (Tent. Draft No. 6), *supra* note 15, § 402(1)(a)–(c). For the text of § 402(1)(a)–(c), see *supra* text accompanying note 350.

in New York City; the Costa Rica defendants submitted to the jurisdiction of the New York courts, agreed to make payments in New York, and agreed to choose New York law as the governing law of the contract.[433]

On the other hand, Costa Rica also had a basis to exercise jurisdiction under Section 402(2) since it sought to regulate "the activities, status, interests or relations of its nationals outside as well as inside its territory."[434] In *Allied Bank,* Costa Rica sought to assert, on the basis of the nationality of one of the contracting parties, its prescriptive jurisdiction to alter the legal rights under the loan contracts. The critical inquiry then becomes whether the exercise of this jurisdiction is reasonable under section 403. A step-by-step analysis of section 403 criteria indicates that the appropriate jurisdiction to prescribe rests, on balance, with the United States.

Subsection (a)(i)–(ii). *The extent to which the activity takes place or has an effect within the regulating state.* Costa Rica's claim would be strengthened if it could demonstrate that the currency decrees were crucial to the preservation of its economy. Still, these factors weigh in favor of Costa Rica's exercise of jurisdiction.

Subsection (b). *Connections, such as nationality, residence, or economic activity, between the regulating state and the persons principally responsible for the activity to be regulated.* Costa Rica has a reasonable claim that it should be able to prescribe law governing the conduct of its national banks. Costa Rica's case for controls is reasonable.

Subsections (c)–(d). *The character of the activity to be regulated, importance of regulation to the regulating state, extent to which other states regulate such activities, desirability of such controls and the existence of justified expectations.* Costa Rica seeks to regulate private contracts between a syndicate of United States commercial banks and its own national banks. In the field of contract law, the protection of justified expectations and predictability of results is particularly important. These factors form part of the basic policies underlying the field of contract law.[435]

The importance of the currency decrees to the preservation of Costa Rica's economy must be considered in light of customary international banking practices. The American banks were not seeking to plunge Costa Rica into economic bankruptcy by insisting on payment under the strict terms of the loan agreements. Rather, as is customary in the field of international banking, the American banks wanted to renegotiate and

433. *See* Allied Bank Int'l v. Banco Credito Agricola de Cartago, 757 F.2d 516, 521 (2d Cir.), *cert. dismissed,* 106 S. Ct. 30 (1985).

434. RESTATEMENT FOREIGN RELATIONS (Tent. Draft No. 6), *supra* note 15, § 402(2).

435. *See* RESTATEMENT (SECOND) CONFLICT OF LAWS §§ 6, 188 (1971).

reschedule the existing loan repayment schedule in a way that would both preserve their own rights and present Costa Rica with a realistic and practicable repayment schedule.[436]

Moreover, Costa Rica sought to regulate an activity not normally considered to be subject to regulation by states. In general, foreign moratoria laws are not recognized by the forum where the contract is payable in the forum state. For example, in *Kleinwort Sons & Co. v. Ungarische Baumwolle Industrie A.G.*,[437] the Court of Appeal enforced in England a contract for the payment of certain bills by a Hungarian bank. After the Hungarian and English parties had entered into the contract, the Hungarian government enacted laws prohibiting Hungarian subjects from paying money outside Hungary without the consent of the Hungarian national bank. The Court of Appeal ruled that the proper law of the contract was English law and that the contract was thus enforceable in the English courts.[438] Lord du Parq stated:

> I do not say for a moment that a sovereign State may not legislate to control the acts of its subjects beyond its borders. Of course it may. Nothing can prevent a sovereign State from so legislating, and it is a matter with which these Courts have no concern. But it is right that it should be understood that, if a sovereign State legislates so as to interfere with the acts of its subjects outside its own territory and, in a sense, its own jurisdiction, then it cannot expect—and I suppose no State would expect—that courts of another country will enforce that legislation at the expense of their own laws.[439]

A leading English commentator has noted that currency regulations of the kind enacted by Costa Rica are not normally entitled to recognition:

> If the contract is governed by the law of a country other than the restricting country, no effect can be attributed to the exchange control regulations of the restricting country which interfere with the performance of the contract as contemplated by the parties. In other words, when it comes to the performance of an English contract, the existence of exchange restrictions in a foreign country need not, as a matter of principle, be considered. . . .

436. *See* Hurlock, *Advising Sovereign Clients on the Renegotiation of Their External Indebtedness*, 23 COLUM. J. TRANSNAT'L L. 29, 29 (1984) (renegotiation of all or some portion of borrowing countries' indebtedness common practice during the past decade).

437. [1939] 2 K.B. 678 (K.B.D.), *aff'd, id.* at 690 (C.A.).

438. *Id.* at 683; *see also* Mann, *Sacrosanctity of Foreign Act of State*, 59 L.Q. REV. 42, 53 (1959) (contractual obligations not subject to law of the situs of the obligation but to the proper law governing the contract).

439. [1939] 2 K.B. at 699; *see also* Rossano v. Manufacturers Life Ins. Co., [1963] 2 Q.B. 352, 371; Toprak v. Finagrain, [1979] 2 Lloyd's L.R. 98 (C.A.); Dalmia Dairy Indus. v. National Bank, [1978] 2 Lloyd's L.R. 223; *In re* Helbert Wagg & Co., [1956] All E.R. 129, 135; Cargo Motor Corp. Ltd. v. Tofalos Transp. Ltd., [1972] S. Afr. L. Rep. 186; Commonwealth Dev. Corp. v. Central African Power Corp., [1968] 3 Afr. L. Rep. 416 (High Ct. Zambia); 2 J.H.C. MORRIS, L. COLLINS, J.D. MCCLEAN & M. MANN, *supra* note 238, at 797–98, 1025–26.

> Its most important application in practice is to be found where under an English contract money is due in *England* and the debtor resides in a restricting State which makes it impossible for him to discharge his obligations. Such consequences of the restricting State's laws are wholly immaterial, because they are extraneous to a contract subject to English law and performable in England.[440]

In the United States, courts have refused to recognize foreign moratoria laws purporting to alter contracts payable in the United States.[441] With respect to the currency decrees involved in *Allied Bank,* then, the customary legal practice of the forum nation is to deny recognition.[442]

An additional factor to be considered is the desirability of the regulation. In this respect, recognition of Costa Rica's jurisdiction to annul these loan agreements would undermine the basic framework of international lending, which is built upon the expectation that nations cannot unilaterally suspend their debt obligations.[443] Further, a finding of Costa Rican jurisdiction

440. F.A. MANN, THE LEGAL ASPECT OF MONEY 418–19 (1982) (emphasis in original).

441. *See* Anglo-Continentale Treuhand, A.G. v. St. Louis S.W. Ry., 81 F.2d 11, 12 (2d Cir.) (L. Hand, J.), *cert. denied,* 298 U.S. 655 (1936); Central Hanover Bank & Trust Co. v. Siemens & Halske A.G., 15 F. Supp. 927, 929 (S.D.N.Y.), *aff'd on opinion below,* 84 F.2d 993 (2d Cir.), *cert. denied,* 299 U.S. 585 (1936); Irving Trust Co. v. Mamidakis, No. 78-0266 (S.D.N.Y. Oct 18, 1978); Pan Am. Sec. Corp. v. Fried, Krupp Aktiengesellschaft, 256 A.D. 955, 10 N.Y.S.2d 205 (1939); South Am. Petroleum Corp. v. Columbian Petroleum Co., 177 Misc. 756, 31 N.Y.S.2d 771 (N.Y. Sup. Ct. 1941); Barnes v. United Steel Works Corp., 11 N.Y.S.2d 161 (N.Y. Sup. Ct. 1939); Deutsch v. Gutehoffnungshutte, Aktienverein Fur Bergbau & Huttenbetrieb, 168 Misc. 872, 6 N.Y.S.2d 319 (N.Y. Sup. Ct. 1938); Glynn v. United States Steel Works Corp., 160 Misc. 405, 289 N.Y.S. 1037 (N.Y. Sup. Ct. 1935); Marks v. United Steel Works Corp., 160 Misc. 678, 289 N.Y.S. 1035 (N.Y. City Ct. 1935).

442. The *Allied Bank* court did not consider whether the loan agreements at issue were "exchange contracts" within the meaning of article VIII, section 2(b) of the Articles of Agreement of the International Monetary Fund (the Bretton Woods Agreement), Dec. 27, 1945, 60 Stat. 1401, T.I.A.S. No. 1502, 2 U.N.T.S. 39, as amended May 31, 1968, 20 U.S.T. 2775, T.I.A.S. No. 6748, and Apr. 30, 1976, 29 U.S.T. 2203, T.I.A.S. No. 8937. Article VIII, section 2(b) provides in relevant part that "[e]xchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this Agreement shall be unenforceable in the territories of any member." Article VIII, section 2(b) has been enacted into United States law by 22 U.S.C. § 286h (1982).

Both the United States and Costa Rica are signatories to the Bretton Woods Agreement and a broad interpretation of "exchange contracts" could encompass the loan agreements at issue in *Allied Bank. See, e.g.,* 2 J. GOLD, THE FUND AGREEMENT IN THE COURTS 425 (1982); Williams, *Extraterritorial Enforcement of Exchange Control Regulations Under the International Monetary Fund Agreement,* 15 VA. J. INT'L L. 319, 338 (1975). It is conceivable that the applicability of article VIII, section 2(b) was not raised in *Allied Bank* because in a related case involving the same Costa Rican currency regulations, a district court held that similar loan agreements were not "exchange contracts" within the meaning of the Bretton Woods Agreement. *See* Libra Bank, Ltd. v. Banco Nacional de Costa Rica, S.A. 570 F. Supp. 870, 900 (S.D.N.Y. 1983).

443. *See* Warden, *supra* note 4, at 295–96, 300 (an essential premise underlying international banking transactions is that contractual undertakings governed by United States law cannot be extinguished by a foreign state's laws); *see also* de Larosiere, Managing Director of the International Monetary Fund, Remarks Before the Institute of Foreign Bankers, May 2, 1984, in 13 IMF

would likely reduce the possibility of future lending by private creditors to what they perceive to be high-risk nations, a prospect that might lead to the economic ruin of many developing nations.[444]

Subsections (e)–(f). *The importance of the regulation to the international system and the consistency of the regulation with traditions of the international system.* Some of the facts relevant to these factors have already been discussed above. Additionally, under the auspices of the International Monetary Fund,[445] debtor and creditor nations have engaged in an effort to resolve the international debt crisis by voluntary arrangement. The effort is undertaken, however, with the assumption that the underlying obligations of the debtor nations remain enforceable.[446]

Subsections (g)–(h). *The interest of another state in regulating the activity and likelihood of conflict with other states.* The interests of Costa Rica and other debtor nations in regulating their debt obligations are balanced by the interest of the United States and other creditor nations in preserving their right to payment. Preservation of the status quo in international lending, which recognizes the enforceability of the underlying debt

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SURVEY 145, 146 (May 21, 1984) (solution to international debt crisis requires three elements: strong adjustment efforts by debtor countries, supportive and cooperative action on the part of the international financiers, and a revitalization of world trade to be achieved by a strengthening of policies by the industrial countries); Hoffman & Deming, *supra* note 6, at 506–08 (lending banks have established expectations that loan agreements payable in the United States are enforceable).

444. *See* de Larosiere, *supra* note 443, at 146 ("the interdependence of the global financing and trading system meant that all parties would lose—and lose heavily—in the event of defaults and the interruption of financial flows and proliferation of trade and payments restrictions that would inevitably have ensued"); Tigert, *supra* note 6, at 520 (denying foreign creditors their bargained-for contractual rights to enforce loan agreements will inevitably have an adverse effect upon future lending to debtor countries). The continued lending by private creditors, such as American banks, is essential to the resolution of the international crisis. *See* Hurlock, *supra* note 436, at 45; Robichek, *The International Monetary Fund: An Arbiter in the Debt Restructuring Process*, 23 COLUM. J. TRANSNAT'L L. 143, 151–52 (1984).

445. The International Monetary Fund (IMF) is an international organization and a specialized agency of the United Nations. *See* Gold, *The International Monetary Fund*, in 2 A LAWYER'S GUIDE TO INTERNATIONAL BUSINESS TRANSACTIONS 3, 7 (W. Surrey & D. Wallace, Jr. eds. 1979). The IMF was established by representatives of forty-four nations at the conclusion of the United Nations Monetary and Financial Conference, which was held in July 1944 in Bretton Woods, New Hampshire. *See* Asherman, *The International Monetary Fund: A History of Compromise*, 16 N.Y.U. J. INT'L L. & POL. 235, 240 (1984).

Among the stated objectives of the IMF are the promotion of international monetary cooperation, exchange stability, and orderly financial and economic conditions. *See* Articles of Agreement of the International Monetary Fund, Dec. 27, 1945, 60 Stat. 1401, T.I.A.S. No. 1501, 2 U.N.T.S. 39, as amended May 31, 1968, 20 U.S.T. 2775, T.I.A.S. No. 6748, and Apr. 30, 1976, art. I (i) & (iii), art. IV, § 1, 29 U.S.T. 2203, 2205, 2208, T.I.A.S. No. 8937; *see also* Gold, *supra*, at 7; Silard, *The Role of the International Monetary Fund*, 32 AM. L. REV. 89, 89–90 (1982). For a succinct discussion of the role of the IMF in the current debt crisis, see Robichek, *supra* note 444, at 143. Currently, 151 nations are members of the IMF. IMF, Fact Sheet, External Relations Dep't (Sept. 1986) (copy on file with the *Washington Law Review*).

446. *See* Tigert, *supra* note 6, at 511–12; *see also supra* note 443.

obligation, is of vital interest to many nations. Recognition of debtor-nations' jurisdiction to suspend debt would undoubtedly lead to serious conflicts with creditor nations.

Weighing the Restatement's criteria together, Costa Rica's exercise of jurisdiction to prescribe with respect to the loan agreement is unreasonable. However, the important point is that instead of relying on the primitive yes/no power theory of jurisdiction to prescribe, the *Allied Bank* court should have engaged in some version of the analysis set forth above. Even if reasonable persons may differ about the judgment reached in some cases, an analysis of the act of state doctrine in terms of jurisdiction to prescribe offers a rational approach to intangible property disputes. Moreover, because jurisdiction to prescribe is part of international law, the settlement of intangible property disputes according to agreed upon standards may help to reduce resentment and lessen tension among nations with conflicting claims to intangible property.

4. Troublesome Cases Under Current Act of State Analysis

Preceding sections have examined several major act of state cases and have demonstrated that an analysis of the act of state doctrine in terms of jurisdiction to prescribe is consistent with and explains the results reached in those cases. This section analyzes act of state cases reaching results many lawyers find disturbing or incorrect. It is a virtue of a legal theory that it can both explain what are generally regarded as correct precedents and demonstrate mistakes in what are generally regarded as troublesome or incorrect precedents.

An example of a troublesome result is that reached in *DeRoburt v. Gannett Co.*[447] There, DeRoburt, the president of Nauru, one of the Marshall Island Republics, sued an American publisher for libel.[448] DeRoburt alleged that the publisher's newspapers, disseminated in the United States and in Nauru, contained defamatory statements accusing him of making illegal loans.[449] The Ninth Circuit agreed with the district court that DeRoburt's complaint inevitably would require inquiry into his motives for making the loans and that the act of state doctrine barred such inquiry.[450] In effect, then, the courts invoked the act of state doctrine to foreclose judicial inquiry even when requested by the foreign sovereign itself. One commentator labeled this result "absurd."[451]

447. 733 F.2d 701 (9th Cir. 1984).
448. *Id.* at 702.
449. *Id.*
450. *Id.* at 703.
451. Bazyler, *supra* note 3, at 346 n.123.

Under the proposed new conception of the act of state doctrine, the United States has the appropriate jurisdiction to prescribe with respect to the activities of an American newspaper company. Based on connections of nationality and territoriality, the exercise of prescriptive jurisdiction in this case is reasonable. The district court should have decided DeRoburt's libel claim under American law.

In *Hunt v. Mobil Oil Corp.*,[452] Hunt alleged that seven American oil companies induced him to resist Colonel Qadhafi's demands for greater profits because they knew such intransigence would lead to confiscation of Hunt's oil properties by Libya.[453] Although Hunt in no way challenged the legality of the confiscation by Libya, the Second Circuit held that his suit was barred since it would require inquiry into the motives of the Libyan government.[454] The court's decision has been criticized as applying the act of state doctrine in an "unprecedentedly broad manner."[455]

Unlike the situation in *OPEC* where the plaintiff asserted that United States antitrust laws governed the conduct of the foreign sovereigns themselves, the *Hunt* court did not need to decide whether antitrust laws applied to Libya because the legality of Libya's conduct was not at issue. Rather, under an analysis of the act of state doctrine in terms of jurisdiction to prescribe, the court should have decided whether United States antitrust laws reached the activities abroad of the seven oil companies. It is significant in this regard that the seven oil companies held a crucial secret meeting in the United States, where they allegedly decided to sabotage Hunt's Libyan oil operation.[456] The United States has a reasonable claim to regulate the conduct of its citizens abroad, especially when its citizens plot, in the United States, a global effort to limit the price and supply of oil sold in the United States, a matter of vital national concern.

5. *Complexity and Manageability of an Analysis of the Act of State Doctrine in Terms of Jurisdiction to Prescribe*

An analysis of the act of state doctrine in terms of jurisdiction to prescribe involves a multivariable approach. Determining whether a given

452. 550 F.2d 68 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977); *see supra* text accompanying notes 153–163.

453. 550 F.2d at 72.

454. *Id.* at 73.

455. Note, *Sherman Act Jurisdiction*, *supra* note 163, at 1259.

456. One factor that supports a finding of jurisdiction to prescribe in the forum is the occurrence of significant activity in the forum nation. *See* 1 J. ATWOOD & K. BREWSTER, JR., *supra* note 385, § 6.12, at 164.; K. BREWSTER, JR., ANTITRUST AND AMERICAN BUSINESS ABROAD 293 (1958). In *Hunt*, the allegedly crucial conspiratorial agreement occurred in the United States. *See* Hunt v. Mobil Oil Corp., 550 F.2d 68, 71 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977).

exercise of jurisdiction to prescribe is reasonable depends upon a weighing of a variety of factors and is, in essence, a balancing test. While one of the virtues of a balancing test is its flexibility, unpredictability and perceived arbitrariness and unfairness can be some of its vices. In addition, an analysis in terms of jurisdiction to prescribe may involve complex, prolonged, and expensive litigation.

While the proposed new conception may have its disadvantages, it is equally clear that the traditional approach to the act of state doctrine based upon concepts of power and absolute territoriality is unacceptable. A multivariable approach to the act of state doctrine is clearly less predictable than the yes/no theory of the doctrine based on power and territoriality. On the other hand, we should never seek to advance the aims of predictability at the expense of rationality. Our search should not be for maximum certainty, but for maximum rationality.[457] Absent treaties or other explicit agreements among nations establishing a framework for the transnational recognition of sovereign acts, there may be no viable alternative to a multivariable approach to the act of state doctrine.

CONCLUSION

In its origins, the act of state doctrine was rooted in Austin's positivist theory that sovereign power is the ultimate source of law. This basic principle led to the corollary principle that sovereign laws were effective only within the sovereign's territory. Since the sovereign has plenary power to back its commands within, but only within, its territory, its laws were effective within, but only within, the sovereign's territory. Beale's vested rights theory of choice of law supplied the necessary step for the act of state doctrine. Legal rights are created by laws of the sovereign and only the laws that created those rights can determine their nature and extent. If an act is valid under the law of the place where the act is done, then the validity of that act cannot be questioned. Within its territory, the sovereign's power to back its commands is absolute; thus, the sovereign's acts, by definition legally valid in the sovereign's own legal system, are equally valid in every other legal system. Originally, the act of state doctrine was a choice of law theory and a principle of external deference.

Fundamental changes in American jurisprudence between the doctrine's birth in *Underhill* and its reconsideration in *Sabbatino* led the Supreme Court to steer the development of the doctrine in a radically different

457. *Cf.* Lowenfeld, *supra* note 332, at 329 (in fashioning test for legislative jurisdiction, search should not be for a "minimum test—'step no further or you will be in violation' . . .[:] search should not be for minimum acceptability, but for maximum rationality").

direction. Austin's view that sovereign power could be the basis of a rational theory of law had been widely and successfully attacked by eminent philosophers. Beale's vested rights theory, conceptually linked to Austin's power theory, met a similar fate at the hands of equally eminent lawyers. In an unrelated but monumental development, the Supreme Court had established the regime of *Erie Railroad v. Tompkins*. As a consequence of *Erie* and its progeny, the *Sabbatino* Court could no longer ground the act of state doctrine in the field of conflict of laws because to do so would have posited the doctrine as a matter of state law, subject to the ultimate control of the state courts, and binding upon the federal courts. Finding the foreign policy implications of the act of state doctrine required that it be governed by federal law, the *Sabbatino* Court faced the task of finding a valid basis for the doctrine in federal law.

Sabbatino found such a valid federal basis in the principle of separation of powers. Since *Sabbatino,* most courts believe that the primary justification for the doctrine lies in the deference that the judiciary owes to the executive in its conduct of foreign affairs. *Sabbatino* thus transformed the doctrine from a principle of external deference to one of internal deference. Following *Sabbatino,* some courts interpreted the doctrine to require ready and meek judicial compliance with the views of the executive in act of state cases. At the same time, other courts linked acts of state with nonjusticiable political questions. An examination of these views revealed that each has serious flaws.

With the rise of international financial markets and the international debt crisis, courts began to apply the act of state doctrine to sovereign acts affecting intangible property and contract rights. Courts were perplexed, however, because of the territorial limitation to the doctrine. Although *Sabbatino* transformed the doctrine from a principle of external deference to one of internal deference, the Supreme Court, without explanation, retained the doctrine's territorial limitation, the principal qualification of the doctrine when it was conceived as one of external deference. As set forth by *Sabbatino,* the act of state doctrine only applies when the sovereign acts to take property located within its own territory. Given this limitation, courts were compelled to fashion tests, which proved to be unsatisfactory, to determine the situs of intangible property.

Today, act of state jurisprudence is in great need of reform. None of the theories of the doctrine can withstand challenge and the theories, taken together, cannot justify the doctrine because they are inconsistent with each other. Courts, not realizing that the doctrine has witnessed a tortuous and splintered development, apply inconsistent theories. The result is a chronic and deep dissatisfaction with a doctrine that, despite cries for its abolition,

shows no signs of disappearing, and, indeed, continues to grow in application and importance in this flourishing age of international trade and business.[458]

Understanding the conceptual origins of the doctrine, its intellectual history, and the powerful jurisprudential and legal themes that have shaped the doctrine leads naturally to a new conception of the doctrine. The doctrine originally concerned the transnational recognition of sovereign lawmaking authority. This recognition was based on the acting sovereign's power to enforce its commands. Once we recognize the doctrine's true conceptual origins, the next step is to trace the lost intellectual history of the concepts that formed the doctrine's original foundation. The final step is to restore the doctrine to its true foundation by building upon contemporary principles concerning transnational recognition of sovereign lawmaking authority.

An examination of the history of the concepts of power and absolute territoriality reveals that they have given way to a more flexible and thoughtful analysis. The recognition of sovereign lawmaking authority no longer depends on rigid notions of power, but on a collective and considered judgment of the appropriateness of a sovereign's given exercise of jurisdiction to prescribe rules of law. This recognition leads to a new conception of the act of state doctrine. Where a sovereign acts within its legitimate sphere of lawmaking competence and not in violation of international law, all other sovereigns must recognize those acts even if to do so would contravene the forum's local public policy. This view of the act of state doctrine restores the doctrine to its origins as a principle of external deference, and, because the doctrine of jurisdiction to prescribe is federal law, satisfies the Supreme Court's insistence on federal supremacy on all issues related to the act of state doctrine.

An analysis of the act of state doctrine in terms of jurisdiction to prescribe explains the results reached in most of the major act of state cases, offers a better approach to act of state cases involving intangible property, and can account for mistakes in the troublesome cases. In addition to its enhanced explanatory power, an analysis of the act of state doctrine in terms of jurisdiction to prescribe is also consistent with the

458. *See* Lowenfeld, *supra* note 332, at 325 (nations are engaging in more and more activities across national boundaries—trade, investment, communications, transport, financial transactions); *see also* Debs, *The Development of International Equity Markets*, 4 B.U. INT'L L.J. 5, 6 (1986) ("In the United States everyone talks about the 'financial revolution'. . . . [Recent] trends will clearly result in closer integration of the major capital markets of the world—that is the process of internationalization.").

growing recognition that mutual tolerance and reciprocal respect, not power, form the basis for an international legal order among nations in the modern world.